(4)

No. 95-489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

JOINT APPENDIX

JAN WITOLD BARAN *
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February 16, 1996

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1995
PETITION FOR CERTIORARI GRANTED JANUARY 5, 1996

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U.S. DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(DENVER)

Civil Docket for Case #: 89-CV-1159

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants

DOCKET ENTRIES

DATE	PROCEEDINGS
7/6/89	Complaint . . . pd Summons Issued Notice of Motion Motion for waiver of Local Rule 300 & 301 Memorandum in support of Motion for Waiver with supporting affidavit of Mr. Snyde; Certificate of Service
7/12/89	ORDER (ZLW) . . . that plaintiff's motion for order waiving application of requirements of Rule 300 and 301 is GRANTED . . . com . . . eod 7/12/89
8/2/89	UNOPPOSED MOTION for Waiver of Local Counsel Requirement . . . by Defendants COS Declaration of Jan W. Baran in Support of Defendants' Cross Motion for Waiver of Local Counsel Requirement
8/7/89	Notice and Acknowledgement of Receipt of S&C, signed by Jan W. Baran[], Counsel for Colorado Republican Federal Campaign Committee on 8/1/89 and another one signed by Jan W. Baran[], Counsel for Douglas L. Jones, Treasurer, on 8/1/89

DATE	PROCEEDINGS
8/16/89	ORDER (ZLW) . . . that defendants' motion for order waiving application of Local Rules 300 and 301 is GRANTED . . . com . . . eod 8/17/89
8/25/89	ANSWER & COUNTERCLAIM . . . by Defendants—cos
8/23/89	ORDER OF REFERENCE (ZLW) . . . to magistrate Schauer for pretrial . . . com . . . eod 8/25/89
10/20/89	Reply to Counterclaim by Plaintiff . . . cos
10/25/89	MINUTE ORDER (HS) . . . initial discovery conference held 10/23/89 . . . discovery cutoff date. 2/28/90 . . . further settlement/status conf. set 3/6/90 at 1:30 . . . com . . . eod 10/25/89
12/89	Letter to Counsel advising of case reassignment to Judge Nottingham
3/16/90	Notice of Motion to compel Motion by Plaintiff to Compel answers to interrogatories w/brief . . . COM
3/19/90	Notice of Motion to Compel . . . COM
3/28/90	Plaintiff Federal Election Commission's Opposition to Defendants' Motion to Compel Discovery . . . C.O.M.
3/29/90	HEARING (HS) . . . statements of counsel . . . plf. opposition to motion to compel filed 3/28/90 and defendant motion to strike filed 3/29/90 STRICKEN . . . plaintiff motion to compel filed 3/16/90 GRANTED with compliance by 4/16/90 . . . plaintiff to refile motion to open discovery . . . Defendant motion to compel filed 3/19/90 GRANTED except for interrogatories 18 and 19 . . . Pretrial 6/29/90 at 1:30 . . . eod 3/30/90. Motion to Strike plaintiff briefs and impose sanctions on plaintiff counsel . . . COM

DATE	PROCEEDINGS
4/3/90	Transcript of Electronically recorded proceedings before Magistrate Schauer on 3/29/90 (pages 1-60)
4/30/90	MOTION of federal election commission to extend discovery
5/3/90	MINUTE ORDER (HS) . . . defs. to respond to motion to extend discovery by 5/15/90
5/15/90	OPPOSITION TO Plaintiff's motion for an extension of discovery . . . by defendants. MOTION for summary judgment . . . by defendants. MEMORANDUM in support of defendants motion for summary judgment . . . by defendants Statement of undisputed facts and support exhibits . . . by defendants . . . Certificate of Service for Motion for Summary Judgment and memo and Statement of Undisputed facts filed 5/15/90.
5/17/90	ORDER (HS) . . . discovery extended to 6/27/90 to permit plaintiff to depose certain individuals . . . Pretrial 6/29/90 at 1:30 . . . COM COS Motion to extend discovery
5/21/90	MINUTE ORDER (EWN) . . . response to motion for summary judgment to be in accordance with rules, reply due 10 days thereafter . . . COM
5/25/90	Notice of Deposition of Howard Callaway 6/5/90
5/29/90	PLAINTIFF's Motion To Hold This Case In Abeyance Or, Alternatively, For An Extension Of Time To Respond To Defendant's Summary Judgment Motion
5/30/90	Defendant's Opposition to Plaintiff's Motion to Hold This Case In Abeyance Or, Alternatively, For An Extension Of Time To Respond To Defendants' Summary Judgment Motion . . . Certificate of Service
6/5/90	Submission by Federal Election Commission under Rule 56 and Affidavit

DATE	PROCEEDINGS
6/12/90	Defendant's response to plaintiff's submission pursuant to Rule 56(F)
6/13/90	Notice of Deposition of Kay Riddle on 6/22/90 at 10:00 Notice of Deposiiton of Doug Goodyear on 6/22/90 at 2:00 Return of Service returned unexecuted as were unable to serve by due date 6/4/90 by Benny L. Bailey
6/14/90	Minute Order (EWN) . . . Ordered that plaintiff will respond to the pending motion for summary judgment on or before 7/6/90 . . . FURTHER ORDERED that all other dispositive motions in this case by filed by 7/6/90 . . . FURTHER ORDERED that no further extension of time will be granted.
6/20/90	MOTION by defendant Colorado Republican, defendant Douglas Jones for protective order, and for sanctions (yk) [Entry date 06/25/90]
6/20/90	CERTIFICATE of service of motion by defendant Colorado Republican, defendant Douglas Jones (yk) [Entry date 06/25/90]
6/21/90	Opposition by plaintiff Federal Election Com to motion for protective order [1-1], motion for sanctions [1-2] (yk) [Entry date 06/25/90]
6/21/90	CERTIFICATE by defendant Colorado Republican, defendant Douglas Jones of faxing Notice of Withdrawal of Motion (yk) [Entry date 06/25/90]
6/25/90	MOTION by plaintiff, defendant to defer pretrial and preparation of pretrial order pending rlg on mtns (yk) [Entry date 06/28/90]
6/26/90	ORDER by Magistrate Hilbert Schauer granting [5-1] motion to defer pretrial Parties shall brief the summary judgment motions. Within 15 days

DATE	PROCEEDINGS
	after a ruling has been entered on the cross motions for summary judgment, a joint proposed scheduling order shall be submitted to magistrate for consideration (cc: all counsel) (pa) [Entry date 07/03/90]
7/6/90	RESPONSE by plaintiff Federal Election Comm to def statement of undisputed facts and supporting exhibits (yk) [Entry date 07/09/90]
7/6/90	STATEMENT by plaintiff Federal Election Comm of material facts not in genuine dispute and supporting exhibits (yk) [Entry date 07/09/90]
7/6/90	Motion by plaintiff Federal Election Com for summary judgment before Judge Edward W. Nottingham (yk) [Entry date 07/09/90]
7/6/90	BRIEF by plaintiff Federal Election Com in support of motion for summary judgment before Judge Edward W. Nottingham [9-1] (yk) [Entry date 07/09/90]
7/8/90	MINUTE ORDER: by Judge Edward W. Nottingham re mtn summary judgment [9-1] response due in accordance w/rules, reply due 10 days thereafter (cc: all counsel) (yk) [Entry date 07/10/91]
7/25/90	RESPONSE by defendant Colorado Republican, defendant Douglas Jones to plf statement of material facts notin dispute (yk) [Entry date 07/27/90]
7/25/90	BRIEF by defendant Colorado Republican in opposition to motion for summary judgment and in reply to plf opposition to def mtn summary judgment before Judge Edward W. Nottingham [9-1] (yk) [Entry date 07/27/90]
8/7/90	REPLY by plaintiff Federal Election Com re [9-1] (1f)
11/14/90	LETTER to court from plaintiff counsel w/addl citation (yk) [Entry date 11/16/90]

DATE	PROCEEDINGS
12/4/90	LETTER to court from REOPEN CERTIO
11/8/93	NOTICE OF TRANSCRIPT ORDER FORM filed by defendants/appellants; (Transcript not necessary) re appeal [21-1] (gc)
11/8/93	NOTICE OF TRANSCRIPT ORDER FORM filed by plaintiff/appellant Federal Election Com; (Transcript not necessary) re appeal [22-1] (gc)
11/8/93	LETTER (Re: [22-1], [21-1]) to USCA and all counsel advising that records is now complete . . . tofs filed stating transcripts not necessary. (gc)
9/15/95	MANDATE from the Court of Appeals; CA #93-1433 and 93-1434; Dt issued 9/14/95; JUDGMENT dated 6/23/95 reversing the decision of the District Court and remanding w/ instructions that the District Court enter judgment in favor of FEC and for a determination under 2 USC 437g(a)(6) of the appropriate civil penalty. re: [Appeal [22-1], [Appeal [21-1]; Mandated order deadline set for 11/14/95 (gc) [Entry dated 09/18/95]
9/15/95	MINUTE ORDER: by Judge Edward W. Nottingham; status conf set for 2:30 9/29/95 (cc: all counsel); entry date: 9/19/95 (yk) [Entry date 09/19/95]
9/28/95	MOTION by plaintiff Federal Election Com, defendant Colorado Republican for leave to appeal by phone (yk) [Entry date 10/02/95]
9/29/95	ORDER by Judge Edward W. Nottingham finding the motion for leave to appear by phone [30-1] moot; status conf set 9/29/95 is vacated (cc: all counsel); entry date: 10/2/95 (yk) [Entry date 10/02/95]
10/6/95	NOTIFICATION from Court of Appeals regarding Petition for Writ of Certiorari Filed in US Supreme Court on 9/21/95 Case No 95-489 (re appeal [22-1], (re appeal [21-1] (gc)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433 and 93-1434

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
	Proceedings in Case No. 93-1433
11/1/93	[718341] Civil case docketed. Preliminary record filed. Transcript order form due 11/12/93 for Roxie English pursuant to R.42.1. Docketing statement due 11/12/93 for Douglas Jones, for Colorado Republican. Notice of appearance due 11/12/93 for Douglas Jones, for Colorado Republican, Federal Election. (pdw) [93-1433]
11/5/93	[720146] Docketing statement filed by Colorado Republican, Douglas Jones. Original and 4 copies c/s: y. (afw) [93-1433]
11/8/93	[721059] Notice received from Appellant Colorado Republican that a transcript is not necessary for this appeal. Notice due that record is complete 11/22/93 for Edward W. Nottingham (afw) [93-1433]
11/8/93	[721436] Filed notice record is complete 11/8/93. (afw) [93-1433 93-1434]

DATE	PROCEEDINGS
11/9/93	[721525] Notice of appearance filed by Carol A. Laham in 93-1433, Thomas W. Kirby in 93-1433, Jan Witold Baran in 93-1433, Carol A. Laham in 93-1434, Thomas W. Kirby in 93-1434, Jan Witold Baran in 93-1434 as attorney for Colorado Republican in 93-1433. Douglas Jones in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434. CERT. OF INTERESTED PARTIES (y/n): n (mbm) [93-1433 93-1434]
11/10/93	[721073] Case referred for settlement conferencing. (afw) [93-1433]
11/10/93	[721529] Notice of appearance filed by Richard B. Bader in 93-1433, Vivien Clair in 93-1433, Kenneth E. Kellner in 93-1433, Lawrence M. Noble in 93-1433 as attorney for Federal Election in 93-1433. CERT. OF INTERESTED PARTIES (y/n): (mbm) [93-1433]
11/15/93	[721439] Cross-appeal schedule set. A/Pet appendix due 12/20/93 for Douglas Jones in 93-1433, for Colorado Republican in 93-1433, for Douglas Jones in 93-1434, for Colorado Republican in 93-1434 (afw) [93-1433 93-1434]
11/23/93	[725454] Case settlement conferencing terminated. (afw) [93-1433 93-1434]
12/13/93	[728884] Notice of appearance filed by Rita A. Reimer, Richard B. Bader, Lawrence M. Noble as attorneys for Federal Election in 93-1433. CERT. OF INTERESTED PARTIES (y/n): y. (pdw) [93-1433]
12/27/93	[732161] First brief on cross-appeal filed by Colorado Republican, Douglas Jones in 93-1433, 93-1434. Original and 7 copies. c/s: y. Served on 12/20/93. Oral Argument? y. 2nd cross-appeal brief due 1/24/94 for Federal Election in 93-1433, for Federal Election in 93-1434 (pdw) [93-1433 93-1434]

DATE	PROCEEDINGS
12/27/93	[732172] Appendix filed by Colorado Republican Douglas Jones in 93-1433, 93-1434. Original and 1 copy (2 volumes). c/s: y. (pdw) [93-1433 93-1434]
1/19/94	[736699] Appellee's motion to extend time to file second brief on cross-appeal until 2/7/94 [93-1433, 93-1434] filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 3 copies. c/s: y (mbm) [93-1433 93-1434]
1/20/94	[736700] Order filed by RLH granting Appellee/ Respondent motion to extend time to file brief [736699-1] in 93-1433, 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
2/8/94	[743586] Second brief on cross-appeal filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 7 copies. Served on 2/7/94 Oral Argument? y (mbm) [93-1433 93-1434]
3/17/94	[751948] Third brief on cross-appeal filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Douglas Jones in 93-1434, Colorado Republican in 93-1434. Original and 7 copies. Served on 3/14/94 (mbm) [93-1433 93-1434]
3/29/94	[754600] Cross-appeal reply brief filed by Federal Election in 93-1433, 93-1434. Original and 7 copies. (kc) [93-1433 93-1434]
9/21/94	[796183] Hearing set for November 1994 Session, at Denver (sls) [93-1433 93-1434 93-1498 94-1040 94-1051, 94-1060 94-1061 94-1066 94-1069 94-1217]
11/4/94	[807426] Appellant's supplemental authority filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434 and submitted to panel. Original and 7 copies. c/s: y (mbm) [93-1433 93-1434]
11/14/94	[809301] Case argued and submitted to Judges Henry, Logan, Reed. (sls) [93-1433 93-1434]

DATE	PROCEEDINGS
12/12/94	[816655] Appellee's supplemental authority filed by Federal Election in 93-1433. Original and. c/s: y (fg) [93-1433 93-1434]
12/13/94	[816664] Appellee's supplemental authority submitted to panel. (fg) [93-1433 93-1434]
6/23/95	[867629] Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Henry; Logan, authoring judge; Reed. [93-1433, 93-1434] (mbm) [93-1433 93-1434]
8/7/95	[875848] Petition for rehearing in banc [93-1433] filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433. Original and 14 copies. c/s: y (mbm) [93-1433]
8/7/95	[875849] Document [875848-1] Petition for rehearing in banc filed by Appellant Douglas Jones, Colorado Republican submitted to panel. (mbm) [93-1433]
8/11/95	[877125] Order filed by Judge(s) Henry, Logan, Reed - response to petition for rehearing due 8/21/95 for Federal Election in 93-1433, for Federal Election in 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
8/21/95	[879331] Response filed by Federal Election in 93-1433 order Response due Original and 15 copies. c/s: y (fg) [93-1433]
8/21/95	[879332] Response filed by Federal Election in 93-1433, Federal Election in 93-1434 Document [879331-1] response Null Relief Code filed by Appellee Federal Election in 93-1433, Document [877125-1] order Response due filed, Robert H. Henry, James K. Logan, Edward C. Reed Jr. in 93-1434 order Response due submitted to panel. (fg) [93-1433 93-1434]

DATE	PROCEEDINGS
9/6/95	[882631] Order filed by Judge(s) Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Logan, Reed denying Petition for rehearing in banc [875848-1] in 93-1433, denying Petition for rehearing in banc [875853-1] in 93-1434. Judges Baldock, Ebel and Kelly voted to grant, Judge Lucero is recused. (mbm) [93-1433 93-1434]
9/14/95	[884426] Mandate issued to district court. Mandate receipt due 10/16/95 in 93-1433, in 93-1434 (afw) [93-1433 93-1434]
9/18/95	[885654] Mandate receipt filed. (afw) [93-1433 93-1434]
10/2/95	[889596] Petition for writ of certiorari filed on 9/21/95 by Appellants Douglas Jones and Colorado Republican in 93-1433, and Appellees Douglas Jones and Colorado Republican in 93-1434. Supreme Court Number 95-489. (afw) [93-1433 93-1434]
11/22/95	[900957] Case filed closed. 11/21/97 in 93-1434, in 93-1433 (das) [93-1433 93-1434]

DATE	PROCEEDINGS
	Proceedings in Case No. 93-1434
11/1/93	[718348] Civil case docketed. Preliminary record filed. Transcript order form due 11/12/93 for Roxie English pursuant to R.42.1. Docketing statement due 11/12/93 for Federal Election. Notice of appearance due 11/12/93 for Douglas Jones, for Colorado Republican, for Federal. (pdw) [93-1434]
11/5/93	[720138] Docketing statement filed by Federal Election. Original and 4 copies c/s: y. (afw) [93-1434]
11/5/93	[720141] Notice received from Appellant Federal Election that a transcript is not necessary for this appeal. Notice due that record is complete 11/15/93 for Edward W. Nottingham (afw) [93-1434]
11/8/93	[721436] Filed notice record is complete 11/8/93. (afw) [93-1433 93-1434]
11/9/93	[721525] Notice of appearance filed by Carol A. Laham in 93-1433, Thomas W. Kirby in 93-1433, Jan Witold Baran in 93-1433, Carol A. Laham in 93-1434, Thomas W. Kirby in 93-1434, Jan Witold Baran in 93-1434 as attorney for Colorado Republican in 93-1433, Douglas Jones in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434. CERT OF INTERESTED PARTIES (y/n): n (mbm) [93-1433 93-1434]
11/10/93	[721074] Case referred for settlement conferencing. (afw) [93-1434]
11/10/93	[721520] Letter re: correction to docketing statement (see correspondence side of file) filed by Appellant Federal Election in 93-1434. Original and 0 copies. c/s: y (mbm) [93-1434]

DATE	PROCEEDINGS
11/15/93	[721439] Cross-appeal schedule set. A/Pet appendix due 12/20/93 for Douglas Jones in 93-1433, for Colorado Republican in 93-1433, for Douglas Jones in 93-1434, for Colorado Republican in 93-1434 (afw) [93-1433 93-1434]
11/23/93	[725454] Case settlement conferencing terminated. (afw) [93-1433 93-1434]
12/14/93	[728472] Order filed by RLH notice of appearance form due 12/27/93 for Federal Election. Parties served by mail. (afw) [93-1434]
12/22/93	[730729] Notice of appearance filed by Rita A. Reimer in 93-1434, Richard B. Bader in 93-1434, Lawrence M. Noble in 93-1434 as attorney for Federal Election in 93-1434. CERT. OF INTERESTED PARTIES (y/n): y. Attorney Kenneth E. Kellner for Federal Election in 93-1434, attorney Stephen E. Hershkowitz for Federal Election in 93-1434 terminated. (mbm) [93-1434]
12/27/93	[732161] First brief on cross-appeal filed by Colorado Republican, Douglas Jones in 93-1433, 93-1434. Original and 7 copies. c/s: y. Served on 12/20/93. Oral Argument? y. 2nd cross-appeal brief due 1/24/94 for Federal Election in 93-1433, for Federal Election in 93-1434 (pdw) [93-1433 93-1434]
12/27/93	[732172] Appendix filed by Colorado Republican Douglas Jones in 93-1433, 93-1434. Original and 1 copy (2 volumes). c/s: y. (pdw) [93-1433 93-1434]
1/19/94	[736699] Appellee's motion to extend time to file second brief on cross-appeal until 2/7/94 [93-1433, 93-1434] filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 3 copies. c/s: y (mbm) [93-1433 93-1434]

DATE	PROCEEDINGS
1/20/94	[736700] Order filed by RLH granting Appellee/ Respondent motion to extend time to file brief [736699-1] in 93-1433, 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
2/8/94	[743586] Second brief on cross-appeal filed by Federal Election in 93-1433, Federal Election in 93-1434. Original and 7 copies. Served on 2/7/94 Oral Argument? y (mbm) [93-1433 93-1434]
3/17/94	[751948] Third brief on cross-appeal filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Douglas Jones in 93-1434, Colorado Republican in 93-1434. Original and 7 copies. Served on 3/14/94 (mbm) [93-1433 93-1434]
3/29/94	[754600] Cross-appeal reply brief filed by Federal Election in 93-1433, 93-1434. Original and 7 copies. (kc) [93-1433 93-1434]
9/21/94	[796183] Hearing set for November 1994 Session, at Denver. (sls) [93-1433 93-1434 93-1498 94-1040, 94-1051, 94-1060 94-1061 94-1066, 94-1069 94-1217]
11/4/94	[807426] Appellant's supplemental authority filed by Douglas Jones in 93-1433, Colorado Republican in 93-1433, Colorado Republican in 93-1434, Douglas Jones in 93-1434 and submitted to panel. Original and 7 copies. c/s: y (mbm) [93-1433 93-1434]
11/14/94	[809301] Case argued and submitted to Judges Henry, Logan, Reed. (sls) [93-1433 93-1434]
12/12/94	[816655] Appellee's supplemental authority filed by Federal Election in 93-1433. Original and. c/s: y (fg) [93-1433 931434]
12/13/94	[816664] Appellee's supplemental authority submitted to panel. (fg) [93-1433 93-1434]

DATE	PROCEEDINGS
6/23/95	[867629] Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Henry; Logan, authoring judge; Reed. [93-1433, 93-1434] (mbm) [93-1433 93-1434]
8/7/95	[875853] Petition for rehearing in banc [93-1434] filed by Douglas Jones in 93-1434, Colorado Republican in 93-1434. Original and 14 copies. c/s: y (mbm) [93-1434]
8/7/95	[875854] Document [875853-1] Petition for rehearing in banc filed by Appellee Douglas Jones, Colorado Republican submitted to panel. (mbm) [93-1434]
8/11/95	[877125] Order filed by Judge(s) Henry, Logan, Reed response to petition for rehearing due 8/21/95 for Federal Election in 93-1433, for Federal Election in 93-1434 Parties served by mail. (mbm) [93-1433 93-1434]
8/21/95	[879332] Response filed by Federal Election in 93-1433, Federal Election in 93-1434 Document [879331-1] response Null Relief Code filed by Appellee Federal Election in 93-1433, Document [877125-1] order Response due filed, Robert H. Henry, James K. Logan, Edward C. Reed Jr. in 93-1434 order Response due submitted to panel. (fg) [93-1433 93-1434]
8/21/95	[879333] Response filed by Federal Election in 93-1434 order Response due Original and 15 copies. c/s: y (fg) [93-1434]
9/6/95	[882631] Order filed by Judge(s) Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Logan, Reed denying Petition for rehearing in banc [875848-1] in 93-1433, denying Petition for rehearing in banc [875853-1] in 93-1434. Judges Baldock, Ebel and Kelly voted to grant, Judge Lucero is recused. (mbm) [93-1433 93-1434]

DATE	PROCEEDINGS
9/14/95	[884426] Mandate issued to district court. Mandate receipt due 10/16/95 in 93-1433, in 93-1434 (afw) [93-1433 93-1434]
9/18/95	[885654] Mandate receipt filed. (afw) [93-1433 93-1434]
10/2/95	[889596] Petition for writ of certiorari filed on 9/21/95 by Appellants Douglas Jones and Colorado Republican in 93-1433, and Appellees Douglas Jones and Colorado Republican in 93-1434. Supreme Court Number 95-489. (afw) [93-1433 93-1434]
11/22/95	[900957] Case file closed. 11/21/97 in 93-1434, in 93-1433 (das) [93-1433 93-1434]

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 89 N 1159

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

Aug. 30, 1993

ORDER AND MEMORANDUM OF DECISION

NOTTINGHAM, District Judge.

This case involves alleged violations of the Federal Elections Campaign Act of 1971, as amended, 2 U.S.C.A. §§ 431-456 (West 1985) (the "Act"). Plaintiff Federal Election Commission sued Defendant Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones, claiming that defendants had failed to report a certain payment as an "expenditure," as required by 2 U.S.C.A. § 441a(d)(3). Plaintiff seeks declaratory, civil, and injunctive relief under the Act. The matter comes before the court on (1) "Defendants' Motion for Summary Judgment" filed May 15, 1990, and (2) "Plaintiff's Motion for Summary Judgment" filed July 6, 1990. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1976).

FACTS

Defendant Colorado Republican Federal Campaign Committee (the "Committee") is an unincorporated political association. It works to advance the goals and values of the Republican Party in the State of Colorado. (Defs.' Statement of Undisputed Facts and Supp. Exs. ¶ 1 [filed May 15, 1990] [hereinafter "Defs.' Statement"], *admitted at* Pl.Fed.Election Comm'n's Resp. to Defs.' Statement of Undisputed Facts and Supp. Exs. ¶ 1 [filed July 6, 1990] [hereinafter "Pl.'s Resp. to Defs.' Statement"]) It is the federally-registered committee for the Republican Party in Colorado and is therefore (as it acknowledges) subject to the Act.

Section 441(a)(3) of the Act limits the amount which such a committee may expend "in connection with the general election campaign of a candidate for federal office." 2 U.S.C.A. § 441a(d)(3). In 1986, the Committee assigned its yearly right to make expenditures under the Act to the National Republican Senatorial Committee. (Defs.' Statement ¶ 16, Ex. 4 [Defs.' Resp. to Pl.'s Req. for Admis.], *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 15-16.) The Committee thereafter paid $15,000 for a radio advertisement, entitled "Wirth Facts #1" [hereinafter "the Advertisement"], the text of which follows:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicans who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for Senate, but he doesn't have a right to change the facts.

(Defs.' Statement ¶ 7, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee devised "Wirth Facts #1" as a response to a series of television advertisements featuring then-Congressman Wirth. These advertisements were sponsored by the Committee for Tim Wirth, Inc. (Pl.Fed. Election Comm'n's Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ.J. and in Opp'n to Defs.' Summ.J.Mot. at 6 [filed July 6, 1990] [hereinafter "Pl.'s Mot."].) The Advertisement ran between April 4 and 13, 1986, four months before the August Democratic primary and seven months before the November general election. (Defs.' Statement ¶¶ 4-6, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee is required by section 434(b)(4)(H)(iv) to make quarterly or monthly reports which must contain any section 441a(d)(3) expenditures. *See* 2 U.S.C.A. § 434(a)(4)(A)(i). In the Committee's quarterly report, it listed the $15,000 paid for the Advertisement as an operating expense—not as a section 441a(d)(3) expenditure—and identified it as "voter information to Colorado voters—advertising." (Defs.' Statement, Ex. 12 at 3 [Defs.' Br. for Fed.Election Comm'n Proceedings].) On June 12, 1986, the Colorado Democratic Party filed an administrative complaint with the Federal Election Commission ("Commission"), alleging, inter alia, that defendants' expenditure for the Advertisement violated the Act. On January 10, 1989, the Commission determined there was probable cause to believe defendants had violated sections 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f) of the Act. When settlement negotiations failed, the Commission instituted this civil action.

The parties filed cross-motions for summary judgment on plaintiff's claim that defendants failed to comply with the Act. Defendants maintain section 441a(d)(3) does not apply to the money paid for the Advertisement because it was not an expenditure "in connection with" the

general election of a candidate for federal office. (Defs.' Mem. in Supp. of Defs.' Mot. for Summ.J. at 6-7 [filed May 15, 1990] [hereinafter "Defs.' Mot."].) Defendants also assert a counterclaim alleging that section 441a(d)(3) is unconstitutional. No material facts are in dispute. Because I find that plaintiff has failed to demonstrate the Advertisement was "in connection with" the general elecion of a candidate for federal office. I grant defendants' motion for summary judgment and deny plaintiff's motion. I therefore need not, and do not, reach defendants' challenge to section 441a(d)(3)'s constitutionality.

ANALYSIS

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where there is "no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*, 477 U.S. at 321, 106 S.Ct. at 2552. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. A triable isue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir.1990). If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and

the moving party is entitled to summary judgment as a matter of law. *Anderson*, 477 U.S. at 250, 106 S.Ct. 2511.

Section 441(d)(3) of the Act is at the center of this dispute. It provides:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign of a candidate for Federal office* in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator . . ., the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State . . .; or
>
> (ii) $20,000. . . .

2 U.S.C.A. § 441a(d)(3) (emphasis added). Because the Committee assigned the full amount of expenditures permitted by section 441a(d)(3) to the National Republican Senatorial Committee, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39-40, 102 S.Ct. 38, 46, 70 L.Ed.2d 23 (1981) [hereinafter *DSCC*], it no longer had the right to make section 441a(d)(3) expenditures. As a consequence, the Committee's expenditure of $15,000 for the Advertisement, if made "in connection with" the general election campaign, was a violation of the spending limits established by section 441a(d)(3).

Two types of expenditures are regulated under the Act: coordinated and independent. A coordinated expenditure is one made in cooperation with, or with the consent of a candidate, his agents, or an authorized committee of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S.Ct. 612, 647 n. 53, 46 L.Ed.2d 659 (1976). An inde-

pendent expendituure is one made without the knowledge or permission of a candidate, his agent, or his campaign committee. *Id.* *See* 2 U.S.C.A. § 431(17). Coordinated expenditures are considered "contributions" under section 441a(a)(7)(B)(i); as such, they may be more freely limited than independent expenditures. *Buckley*, 424 U.S. at 48, 96 S.Ct. at 647-48; *Federal Election Comm'n v. National Conservatice Political Action Comm.*, 470 U.S. 480, 491, 105 S.Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) [hereinafter *NCPAC*]. In *Buckley*, the Court upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures. *NCPAC*, 470 U.S. at 491, 105 S.Ct. at 1465. *See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260, 107 S.Ct. 616, 630, 93 L.Ed.2d 539 (1986) [hereinafter *MCFL*] ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97, 101 S.Ct. 2712, 2720, 2724-25, 69 L.Ed.2d 567 (1981) (same).

Expenditures by party committees are considered to be coordinated expenditures subject to the monetary limits of section 441a(d). *DSCC*, 454 U.S. at 27 n. 1, 102 S.Ct. at 40. n.1.[1] Party committees have been deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates. *DSCC*, 454 U.S. at

[1] Defendants point to a passage in *Buckley* which classifies 2 U.S.C.A. § 608(f) (West 1970) (recodified as section 441a[d]) as an "expenditure ceiling," as opposed to a contribution limitation. According to defendants, this reference suggests the Court considered section 441a(d) to regulate independent expenditures. It is unclear how referring to section 441a(d) as an "expenditure" limitation necessarily suggests the section regulates *independent* expenditures. In light of the Court and Commission's other pronouncements, and the fact that this reference is dicta, *see Buckley*, 424 U.S. at 58 n. 66-67, 96 S.Ct. at 653 n. 66-67, I do not find this singular reference persuasive.

27, n. 1, 102 S.Ct. at 40 n. 1. *See also* FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985); FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984).

The Commission has the "primary and substantial responsiblity for administering and enforcing the Act," and has "extensive rulemaking and adjudicative powers." *Buckley*, 424 U.S. at 109-10, 96 S.Ct. at 677-78. When interpreting the Act, the Commission's interpretation is presumptively entitled to deference. *DSCC*, 454 U.S. at 38, 102 S.Ct. at 45. The Commission has, by regulation, forbidden independent expenditures by national and state party committees. *See* 11 C.F.R. § 110.7(B)(4) (1981).

Defendants suggest that because no Republican candidate had been nominated, the expenditure was necessarily "independent," not "coordinated." However, for purposes of determining whether an expenditure is coordinated or independent, it is irrelevant whether a candidate has been nominated at the time the expenditure is made. *See* FEC Advisory Opinion 1985-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). "[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." *Id.* Organizations whose major purpose is the nomination or election of a candidate "are, by definition, campaign related," *Buckley*, 424 U.S. at 80, 96 S.Ct. at 663, regardless of whether a specific candidate has been nominated. Based on Supreme Court precedent and the Commission's interpretation of the statute, I find that the Committee's expenditure was coordinated. It was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated.

The Committee's expenditure would nevertheless not be subject to section 441a(d)(3) limitations unless the ex-

penditure was made "in connection with" the general election compaign of a candidate for federal office. No controlling or persusaive authority has interpreted the phrase "in connection with" in the context of section 441a (d)(3). The Court, however, has interpreted the phrase "in connection with" in the context of section 441b, which, like section 441a(d)(3), regulates contributions and expenditures. In *MCFL*, the Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249, 107 S.Ct. at 623. *See also Buckley*, 424 U.S. at 80, 96 S.Ct. at 663. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Sorenson v. Secretary of Treasury of the United States*, 475 U.S. 851, 860, 106 S.Ct. 1600, 1606, 89 L.Ed.2d 855 (1986); *Barnson v. United States*, 816 F.2d 549 (10th Cir.), *cert. denied*, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987) (when the same words are used in dicerent sections of the same law, they will be given the same meaning).

This rule of statutory construction is usually followed where different parts of the same act have a similar purpose, as do sections 441a(d)(3) and 441b. Both sections 441a(d)(3) and 441b are intended to regulate contributions and expendiutres of multi-person organizations. While section 441a(d) regulates expendiutures by national committees, state committees, or subordinate committees of the state committees, section 441b regulates expenditures by national banks, corporations, or labor organizations. Since I examine the statute as a whole, I find the Court's interpretation of "in connection with" in the context of section 441b to be persuasive of my interpretation of the same words in section 441a(d)(3).

Plaintiff urges the court to adopt the Commission's interpretation of "in connection with" which would require

the Advertisement to contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, 1 Fed.Election Campaign Fin.Guide (CCH) ¶ 5819 (July 18, 1985). According to plaintiff, section 441b differs significantly from section 441a(d)(3), in that 441b regulates independent expenditures, whereas section 441a(d)(3) regulates coordinated expenditures. Although *Buckley* acknowledges that coordinated expenditures may be more freely regulated than independent expenditures, it does not follow that the identical words, when used with reference to coordinated expenditures, should be given a more expansive interpretation.

The Supreme Court's decision in *Buckley* suggests just the opposite. When examining the intrusiveness of the statute's regulations on first amendment freedoms, the Court found that a limitation on coordinated expenditures was justified in order to stem "the reality or appearance of corruption in the electoral process." *Buckley*, 424 U.S. at 46, 96 S.Ct. at 647-48. Although the Court found the justification for regulating coordinated expenditures outweighed the infringement on the First Amendment, this conclusion does not create a carte blanche for expansive regulation of coordinated expenditures. On the contrary, the fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined "express advocacy" interpretation in order to minimize intrustions.[2] Moreover, as *Buckley* notes, the limita-

[2] A narrow interpretation of the words "in connection with" also addresses the constitutional concerns raised by defendants. Defendats contend that if all expenditures by state committees were deemed contributions subject to section 441a(d)(3), then they would not be free to speak in favor of their candidates. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ.J. and in Reply to Pl.'s Opp'n to Defs.' Mot. for Summ.J. at 4 [filed July 25, 1990] [hereinafter "Defs.' Reply"].) By adopting a more narrowly defined interpretaiton of "in connection with," state political committees remain free to engage in speech which does not expressly advocate the election of its candidates.

tion on contributions by state political committees "[r]ather than undermining freedom of association, . . . enhances the opportunity of bona fide groups to participate in the election process." *Buckley,* 424 U.S. at 33, 96 S.Ct. at 642. Given that the effect of the regulation is to enhance the political freedom of committees, I find that the "express advocacy" standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification within the Commission's advisory opinion, nor in plaintiff's argument, for expanding *Buckley*'s carefully circumscribed exception to its prohibition against regulation of freedom of speech.

The Commission does not point to any other section of the statute where the courts have given the language "in connection with" the expansive interpretation the Commission advocates in this case. In fact, the courts have consistently interpreted "in connection with" as requiring "express advocacy." *See Federal Election Comm'n v. Furgatch,* 807 F.2d 857, 864 (9th Cir.), *cert. denied,* 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987); *Federal Election Comm'n v. Central Long Island Tax Reform,* 616 F.2d 45, 53 (2nd Cir.1980).[3] In *Orloski v. Federal Election Commission,* 795 F.2d 156 (D.C.Cir.1986), the

[3] In *United States v. International Union UAW-CIO,* 352 U.S. 567, 587, 77 S.Ct. 529, 550, 1 L.Ed.2d 563 (1957), the Court interpreted "in connection with" in the context of a predecessor to the current Act, which prohibited corporate or union contributions or expenditures to be used "in connection with" any election for federal office. *Id.,* 352 U.S. at 568, 77 S.Ct. at 530. The Court held that the "in connection with" found in the statute was understood to proscribe "the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party." *Id.,* 352 U.S. at 587, 77 S.Ct. at 550. It is unclear from this language whether the Court was adopting a different interpretation of "in connection with" or merely applying the "express advocacy" standard. Plaintiff does not explain how this language differs materially from the "express advocacy" standard. Since no court has subsequently adopted the language used in *International Union UAW-CIO,* I decline to do so in this case.

Commission itself advocated the adoption of the "express advocacy" interpretation of "in connection with" in the context of section 441b(a). In adopting the Commission's interpretation, the D.C. Circuit noted:

> [T]he FEC's interpretation is consistent with *Buckley,* in which the Supreme Court held that under the first amendment, the phrases "for the purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley,* 424 U.S. at 78-80, 96 S.Ct. at 663-64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical, reasonable, and consistent with the overall statutory framework. *The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and evenhandedness with which the FEC ultimately administers the Act.*

Orloski, 795 F.2d at 166-67 (emphasis added). *See also* FEC Advisory Opinion 1978-46, 1 Fed.Election Campaign Fin.Guide (CCH) ¶ 5348 (Oct. 5, 1978) (suggesting that section 441a(d) requires "express advocacy").

The "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *DSCC,* 454 U.S. at 35, 102 S.Ct. at 44; *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 287 n. 5, 98 S.Ct. 566, 573 n. 5, 54 L.Ed.2d 538 (1978). I do not find the Com-

mission's suggested interpretation of "in connection with" to be entitled to deference where it is neither thorough nor consistent with either its own previous rulings or ths courts' holdings. I conclude that "express advocacy" is required in order for a coordinated expenditure to be "in connection with" the general election campaign of a candidate for federal office under section 441a(d)(3).

Having made this determination, I must decide whether the Advertisement constituted "express advocacy." The Court has adopted a bright-line test for identifying speech which constitutes "express advocacy" recognizing that:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42, 96 S.Ct. at 645. *See Furgatch*, 807 F.2d at 860; *Federal Election Comm'n v. National Organization for Women*, 713 F.Supp. 428, 432 (D.D.C. 1989). The Court defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.'" *Buckley*, 424 U.S. at 46 n. 52, 96 S.Ct. at 647 n. 52. Speech is "advocacy" if it "presents a clear plea for specific action, and . . . it must be clear what action is advocated." *Furgatch*, 807 F.2d at 864. Speech which is merely informative would not be considered "advocacy." *Id.* When determining whether speech constitutes "express advocacy," the focus is on the actual wording used. *Buckley*, 424 U.S. at 42, 96 S.Ct. at 646.

The Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests,

the Advertisement contains an indirect plea for action. The Advertisement concludes with "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the Advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.

According to plaintiff, the surrounding circumstances suggest the Advertisement was, in fact, a plea for action. The Advertisement identified Wirth by name and position, referred to his senate candidacy, responded to Wirth's own campaign advertisements, and said "paid for by the Colorado Republic State Central Committee." (Pl.'s Mot. at 15.) At the time the Advertisement ran, plaintiff maintains, Wirth was the only credible announced Democratic candidate for Senate. *Id.* In addition, the public "knew" the sponsor of the Advertisement, *i.e.*, the Republican party, would eventually nominate a candidate. Thus, the Advertisement implicitly urged the public both to vote against Wirth and to support whomever the Republican candidate would be. Plaintiff also points to contemporaneous press statements of Howard "Bo" Callaway, then Chairman of the Colorado Republican Party, concerning the state committee's general purpose which allegedly leave "no doubt that the intent of the ad was to attack Mr. Wirth's candidacy for the Senate." (Pl.'s Mot. at 10-11, 17-18.)

I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation. *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471 (1st Cir.1991). In adopting a bright-line approach, the Court noted the difficulty in interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both

> of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43, 96 S.Ct. at 646 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 325, 89 L.Ed. 430 [1945]). In adopting the "express advocacy" standard, the Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14-15, 96 S.Ct. at 632. Trying to determine whether the surrounding circumstances, coupled with the implications of the Advertisement, constitute "express advocacy" leads to the type of semantic dilemma which the Court sought to avoid by adopting a bright-line rule. I decline to blur *Buckley*'s bright-line rule by interpreting the Advertisement's criticism of Wirth as "express advocacy." Viewing the facts in the light most favorable to plaintiff, I find that the Advertisement does not call for the type of "express advocacy" required by *Buckley*. Because I conclude that no reasonable trier of fact could find for plaintiff on the basis of the evidence presented, defendants are entitled to summary judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

With regard to plaintiff's motion for summary judgment, the analysis of whether the Advertisement constitutes "express advocacy" is the same. Defendants allege that the Advertisement neither contains a direct plea for action, nor conveys support for a particular candidate. According to defendants, the Advertisement simply informed the public about the political record of an incumbent Colorado congressman; it did not advocate voting for or against any political candidate. (Defs.' Mot. at 7.) In addition, the Advertisement was broadcast seven months before the general election—before either party had chosen its candidate. (Defs.' Reply at 10.) Defendants Claim Wirth's senate candidacy was referenced in the Advertisement only for the purpose of identifying his statements. (Defs.' Reply at 9.) Plaintiff fails to adequately rebut these claims. Accordingly, plaintiff's motion for summary judgment is denied.

Conclusion

Because I find that the expenditure for the Advertisement was not "in connection with" the general election of a candidate for federal office, it was not subject to section 441a(d)(3) limitations and did not violate the Act. Since I am able to resolve the dispute on statutory grounds, I do not reach defendants' challenge to the constitutionality of section 441a(d)(3). Defendants cannot avoid this result by posturing the constitutional issue as an independent counterclaim. It is therefore

ORDERED as follows:

(1) Plaintiff's motion for summary judgment is DENIED; and

(2) Defendants' motion for summary judgment is GRANTED. All claims against defendants are dismissed. Defendants' counterclaim is DISMISSED as moot.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-1433, 93-1434

FEDERAL ELECTION COMMISSION,
Plaintiff/Counter-Defendant/Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, Douglas Jones,
Defendants/Counter-Claimants/Appellants/Cross-Appellees.

June 23, 1995

Before HENRY and LOGAN, Circuit Judges, and REED, District Judge.*

LOGAN, Circuit Judge.

The Federal Election Commission (FEC) appeals from the dismissal on the merits of its underlying suit filed against the Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones (collectively the Committee) alleging violations of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-442. The Committee cross-appeals from the dismissal as moot of its counterclaim challenging the constitutionality

* The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.

of the FECA expenditure limitations. We hold that the Committee expendiutres at issue did violate the coordinated expenditure limitation in 2 U.S.C. § 441a(d)(3). We also reach the constitutional issue and hold that § 441a (d)(3) does not violate the Committee's First Amendment rights.

This action stems from the 1986 United States senatorial campaign in Colorado, and pre-election spending by the Committee. In January 1986, then-Congressman Timothy E. Wirth had registered with the FEC as a candidate for the Democratic nomination for the U.S. Senate. Several months later, but before either political party had nominated senatorial candidates, the Committee spent $15,000 for a radio advertisement directed at Wirth's announced candidacy ("Wirth Facts #1").[1] This spending prompted the Colorado Democratic Party's administrative complaint with the FEC alleging that it was an "expenditure in connection with" the general election campaign of a candidate for federal office in violation of the spending limits set out in FECA § 441a(d)(3).

The FEC made a probable cause determination that the Committee violated the FECA. When the parties were unable to reach a settlement the FEC filed suit. The FEC alleged that the Committee failed to report the amount spent on the anti-Wirth publicity as an "expendi-

[1] Wirth Facts #1 read:

> Paid for by the Colorado Republican State Central Committee.
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

Jt.App. 95-96.

ture in connection with" the general election campaign, in violation of FECA §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). The Committee counterclaimed, alleging that the FECA was an unconstitutional infringement on its First Amendment rights. In ruling on the parties' cross motions for summary judgment, the district court dismissed the underlying action after finding no FECA violation, and dismissed the counterclaim as mooted by its merits ruling. These appeals followed.

I

We first address whether the district court correctly concluded that the Committee did not violate the FECA. We review de novo a district court's grant of summary judgment using the same legal standards as the district court. *Clark v. Haas Group, Inc.*, 958 F.2d 1235, 1237 (10th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992).

A

The FECA regulates contributions made to federal candidates and political parties, and expenditures made by persons and political committees. It also imposes record-keeping and reporting requirements. The Committee acknowledges that it is subject to the FECA as a federally registered committee of the Colorado Republican Party.

The statute limits monetary contributions and expenditures by state and national political party committees as follows:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a

> political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> * * * *
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> > (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
> >
> > (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
> >
> > (ii) $20,000.

2 U.S.C. § 441a(d)(1) and (3). A state political party committee may assign to a designated agent (including a national party committee) the right to make the expenditures the state party could have made. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41-43, 102 S.Ct. 38, 46-48, 70 L.Ed.2d 23 (1981) (*DSCC*). Here the Committee expended funds on the anti-Wirth publicity after assigning to the National Republican Senatorial Committee the authority to make all of the expenditures—$103,248—it was allowed under § 441a(d)(3) for the 1986 U.S. Senate election. *See* I Jt.App. 4, 14; II *id.* 473. The Committee did not report the $15,000 anti-Wirth publicity expense under 2 U.S.C.

§ 434(b)(4)(H)(iv),[2] instead characterizing it as an expense for "Voter Information to Colorado Voters—Advertising." II App. 478, ¶ A. The narrow issue is whether the anti-Wirth publicity expense was an "expenditure in connection with the general election campaign" pursuant to § 441a(d)(3) and should have been reported accordingly. If so, the Committee exceeded the § 441a(d)(3) monetary ceiling.

As relevant here, the FECA addresses two types of campaign expenditures: independent and coordinated.[3] A coordinated expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 n. 53, 96 S.Ct. 612, 648 n. 53, 46 L.Ed.2d 659 (1976). *See also* 11 C.F.R. § 110.7(b)(4). Because political parties are considered incapable of making independent expenditures, the district court correctly found that the anti-Wirth publicity expense was a coordinated

[2] 2 U.S.C. § 434(b)(4)(H)(iv) reads in part:

> (b) Contents of reports
>
> Each report under this section shall disclose—
>
> (4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
>
> (H) for any political committee other than an authorized committee—
>
> (i) contributions made to other political committees;
>
> (ii) loans made by the reporting committees;
>
> (iii) independent expenditures;
>
> (iv) expenditures made under section 441a(d) of this title; and
>
> (v) any other disbursements.

[3] An independent expenditure is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

expenditure. *See DSCC*, 454 U.S. at 29 n. 1, 102 S.Ct. at 41 n. 1. If that spending was an "expenditure[] in connection with" the campaign it was subject to the monetary limitations at § 441a(d). *Id.* The district court concluded that the Committee's coordinated expenditure on the anti-Wirth publicity was not made in connection with the 1986 Colorado senatorial campaign, and therefore was not subject to the § 441a(d)(3) limits.

B

The FECA does not clearly manifest the meaning Congress intended to attach to the "expenditures in connection with" language in § 441a(d)(3) Acknowledging that there were no controlling or persuasive cases interpreting that section, the district court relied upon *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), and its interpretation of FECA § 441b. Section 441b[4] restricts the

[4] 2 U.S.C. § 441b provides in relevant part as follows:

> (a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.
>
> . . . .

[Continued]

contributions and expenditures of national banks, corporations, or labor organizations. The Supreme Court in *MCFL* considered whether Massachusetts Citizens for Life, Inc., a nonprofit, nonstock corporation, by financing a newsletter urging voter support for identified pro-life candidates, violated the "independent spending" limitations in in § 441b. *Id.* at 241, 107 S.Ct. at 619. Interpreting the term "expenditure in connection with any election" the Court held that the expenditure "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249, 107 S.Ct. at 623.

MCFL relied upon the *Buckley* opinion's interpretation of a limitation on independent expenditures "relative to" a clearly identifiable candidate. To avoid invalidating on vagueness grounds what was then FECA § 608(e)(1), the *Buckley* Court held the term encompassed only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate

[4] [Continued]

(b)(2) For purposes of this section and section 79*l*(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

for federal office." *Buckley*, 424 U.S. at 44, 96 S.Ct. at 646-47. The opinion clarified in a footnote that this construction would restrict the application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* n. 52. *MCFL* adopted the same definition, referencing the same footnote, for purposes of § 441b's independent spending limitation. 479 U.S. at 249, 107 S.Ct. at 623.

The district court, noting the identity of the "expenditures in connection with" language in § 441b and in § 441a(d)(3), concluded that the anti-Wirth publicity was not express advocacy and therefore not governed by the § 441a(d)(3) limitations. The district court relied in part on a common law rule of statutory construction that identical words used in different sections of the same statute generally should be given the same meaning. However, the Supreme Court has also stated that "the presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S.Ct. 50, 51, 79 L.Ed. 211 (1934).

Further, we cannot overlook a significant distinction between *Buckley* and *MCFL* and the instant case. The *Buckley* opinion distinguished between independent expenditures—regulated by then FECA § 608(e)(1)—and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" under the FECA.[5] 424 U.S. at 46-47 & n. 53, 96 S.Ct. at 648 & n. 53. Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough

[5] Coordinated expenditures are treated as campaign contributions that must be reported pursuant to § 441a(a)(7)(B)(i).

government interests to be constitutional, it reached the opposite conclusion as to the limitations on expenditures by national or state political parties. *Id.* at 55-59 & n. 67, 96 S.Ct. at 652-54 & n. 67 ("Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants."). *Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court. *See DSCC*, 454 U.S. 27, 29 n. 1, 102 S.Ct. 38, 41 n. 1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such "independent' expenditures by the national and state party committees."). Similarly, *MCFL* made the same distinction when interpreting the meaning of independent expenditure limits in § 441b. *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 628-29.

Subsequent amendments to the FECA include "expressly advocating" into the definition of independent expenditures. *See* 2 U.S.C. § 431(17). Coordinated expenditures of political parties, however, are not defined in this manner. *See id.* § 431(9)(B)(ix); *cf. id.* § 431(8)(B)(v), (x), (xii) (what is not a contribution). This is some evidence of congressional intent that the phrases are not intended to have the same meaning.

The distinction between independent expenditures and political party expenditures that are deemed to be contributions, and their different treatment by the Supreme Court, negates the necessity that "expenditures in connection with" be construed identically in different sections of the FECA. However, the meaning of "expenditures in connection with" is not perfectly clear, else the Court in *MCFL* would not have had to cabin its meaning under

§ 441b in the manner it did. The question then becomes whether we must construe the phrase as narrowly as the Supreme Court did in *MCFL* in order to uphold its validity.

C

The FEC has issued advisory opinions interpreting the "expenditures in connection with" phrase in § 441a(d(3) in a manner different than that adopted by the district court and urged upon us by the Committee. We believe this is an appropriate circumstance in which to follow the Supreme Court's admonishment that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (footnote omitted); *see also DSCC*, 454 U.S. at 37, 102 S.Ct. at 44-45 (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded").[6]

FEC Advisory Opinion 1984-15 addressed questions raised by the Republican Party regarding spending for a series of television ads denigrating the potential Democratic presidential candidates, relating to an upcoming election. The FEC responded to a specific question whether such spending was within the limitations of § 441a(d).

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with

[6] We note that one of the reasons the *Buckley* opinion gave for its "express advocacy" restrictive interpretation of § 608(e)(1)'s "relative to" language was that most who were subject to the statute's criminal sanctions had no right to obtain an advisory opinion of the FEC. *See* 424 U.S. at 40 n. 47, 96 S.Ct. at 645 n. 47. It noted that only candidates, federal office holders and *political committees* had that right. *Id.* Section 441a(d), at issue before us, applies only to political committees; thus all to whom it applies can secure advisory opinions from the FEC.

> that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984) (footnote omitted). The opinion then concluded that the spending in question was a coordinated expenditure subject to the limitations in § 441a (d)(2).

Advisory Opinion 1985-14 responded to questions from a Democratic Congressional Committee regarding proposed publicly focusing on a number of congressmen, not all with announced opposition candidates. A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (May 30, 1985). The opinion endorsed Advisory Opinion 1984-15 with its construction of § 441a(d) as regulating expenditures that "both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message." [7]

The FEC has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley*, 424 U.S. at 109, 96 S.Ct. at 677-78. The FEC argues that its construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electionering message as a reasonable one to which we must defer. Viewing the party expenditures as contributions, as we must, we agree.

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[7] Advisory Opinion 1978-46 appears more restrictive; it can be read to adopt the express advocacy position. A.O. 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978). But even if the more recent decisions represent a change in position by the FEC we must still give the current view deference if the current construction is reasonable. *Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S.Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991).

"[T]he primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC* 454 U.S. at 41, 102 S.Ct. at 47. The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter. Our analysis, therefore, with respect to controls on coordinated expenditures and contributions under § 441a is different than that required for § 441b.

Section § 441a(d) addresses the concern that large contributors to political parties will exert undue influence on a candidate if elected to office. The monetary ceiling on coordinated expenditures by political organizations diminishes the potential of such undue influence but preserves the important role of political parties. *See DSCC*, 454 U.S. at 41, 102 S.Ct. at 46-47. In contrast, the purpose behind § 441b is to prevent corporate and labor expenditures from effectively acting as "political war chests" on behalf of candidates, because these organizations could use funds "amassed in the economic marketplace . . . [for] unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257, 107 S.Ct. at 627. The FECA thus provides different regulations tailored to different perceived evils.[8] Independent expenditures are theoretically unlimited but such expenditures in excess of low limits must be reported, along with identification of those who contributed more than $200. Contribution limits still apply. Giving deference to the FEC's interpretation, we hold that § 441a(d)(8) applies to coordinated spending that involves a clearly identified candidate and

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[8] We have already discussed how subsequent FECA amendments have adopted the "express advocacy" criteria to differentiate between independent and coordinated expenditures.

an electioneering message, without regard to whether that message constitutes express advocacy.

D

The Committee does not seriously contest that the anti-Wirth publicity was directed at a clearly identified candidate. "Wirth Facts #1" referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of the current election.[9] Wirth was not yet the Democratic nominee, but the FECA regulates coordinated expenditures made before the primary election. A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766. The Committee's objective to elect the eventual Republican candidate is not diminished because a Democratic nomine has not emerged. *See Buckley*, 424 U.S. at 79, 96 S.Ct. at 633 (major purpose of expenditures by candidates and political committees "is the nomination or election of a candidate").

We next consider whether "Wirth Facts #1" contained an electioneering message.[10] Advisory Opinion 1984-15 examined proposed television advertising by the Republican National Committee that would "question or challenge the candidate's statements, position, or record." The FEC concluded that the

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[9] *See also* 2 U.S.C. § 431(18) which reads:

The term "clearly identified" means that—

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

[10] We agree with the district court that the message in "Wirth Facts #1" would not constitute express advocacy within the narrow definition of *Buckley* and *MCFL*. It lacks the express words "vote for" or "vote against," or words of similar import, although it comes close when the ad suggests that an identified candidate distorted his voting record.

> clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republic Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. . . . These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (citation and footnotes omitted). The next year, the FEC relied upon that construction in rendering Advisory Opinion 1985-14 to the Democratic Congressional Campaign Committee stating that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.'" A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587, 77 S.Ct. 529, 539, 1 L.Ed.2d 563 (1957)).

Any reasonable reading of "Wirth Facts #1," which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to "diminish" public support for Wirth and "garner support" for the unnamed Republican nominee. "Wirth Facts #1" unquestionably contained an electioneering message. We conclude that that the anti-Wirth publicity was an "expenditure in connection with" the 1986 Colorado senatorial election be-

cause it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA by making a § 441a(d)(3) expenditure after delegating to the National Republican Senatorial Committee the authority to spend all of the Committee's available funding for the 1986 Colorado Senate race.

II

We next consider the Committee's constitutional challenges to the FECA. The Committee asserts that the monetary caps in § 441a(d)(3) violate its First Amendment guarantees of freedom of speech and association. The Committee focuses on the alleged absence of a compelling governmental interest served by the restrictions in § 441a(d)(3) and also asserts that the statute discriminates based upon content. The FEC's position is that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court. We agree with the FEC that § 441a(d)(3) is a permissible burden on speech and association.

The primary purpose of the contribution and expenditure caps in the FECA are to prevent corruption or the appearance of corruption. *Buckley* 424 U.S. at 25-26, 96 S.Ct. at 637-38. The FECA starts from the premise that political committees may make only minimal expenditures in connection with campaigns, § 441a(a) (dollar limits on contributions), then creates one exception at § 441a(d)(3) (coordinated expenditure limits for certain political committees made in connection with federal election campaigns). *DSCC*, 454 U.S. at 28-29 n. 1, 102 S.Ct. at 40-41 n. 1; 11 C.F.R. § 110.7(b); *see also* 2 U.S.C. § 431(14)-(16). This exception allows for greater monetary support by political parties than would otherwise be permitted by § 441a(a). The coordinated expenditures permitted by § 441a(d)(3) are treated for purposes of

reporting and monetary limitations as contributions from the political committee to the candidate, § 441a(a)(7)(B)(i); *see also* § 434(b)(4)(H)(iv), and fall within the contribution ceilings contained in § 441a(a). *See Buckley*, 424 U.S. at 46, 96 S.Ct. at 647-48; *FEC v. National Political Action Committee*, 470 U.S. 480, 492, 105 S.Ct. 1459, 1466, 84 L.Ed.2d 455 (1985) (*NCPAC*).

The same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.[11] The opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures. *See Buckley*, 424 U.S. at 26-27, 96 S.Ct. at 638-39; *NCPAC*, 470 U.S. at 497, 105 S.Ct. at 1468-69. The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures. The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expendi-

[11] We acknowledge that *Buckley* upheld then 18 U.S.C. § 608(f) as constitutional when challenged as discriminatory under the Fifth Amendment, and not the First Amendment, which is the basis for the Committee's constitutional challenge here. *Buckley*, 424 U.S. at 59 n. 67, 96 S.Ct. at 654 n. 67. However, *MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges to 441b. We do not, therefore, discount the importance of *Buckley* in the context of our First Amendment analysis.

tures by political parties. This case is, therefore, ideally postured for deference to the congressional will.

The Supreme Court has endorsed the government's interest in curtailing large campaign contributions as legitimate. In addition to preventing corruption or the appearance of corruption, these restrictions "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, 96 S.Ct. at 638, and to a degree cap campaign costs and increase accessibility to our political system. *Id.* The Court has distinguished between restrictions on contributions and restrictions on independent expenditures and then invalidated spending restrictions while upholding contribution limits. *Id.* at 58-59, 96 S.Ct. at 653-54.

By treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political *quid pro quo* from current and potential office holders." *Id.* at 26-27, 96 S.Ct. at 638. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

We REVERSE and REMAND with instructions that the district court enter judgment in favor of the FEC, and for a determination under 2 U.S.C. § 437g(a)(6) of the appropriate civil penalty.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433, 93-1434
(D.C. No. 89-N-1159)

[Caption Omitted in Printing]

ORDER

Entered September 6, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LOGAN Circuit Judges and REED*, District Judge.

This matter comes on for consideration of appellants/cross-appellees Colorado Republican Federal Campaign Committee and Douglas Jones' suggestion for rehearing in banc.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. The court having been polled

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* The Honorable Edward C. Reed, Jr., Senior United States Judge, United States District Court for the District of Nevada, sitting by designation.

on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judges Baldock, Ebel and Kelly voted to grant rehearing. Judge Lucero is recused.

Entered for the Court

PATRICK FISHER
Clerk

_____

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

_____

Civil Action No. ———

FEDERAL ELECTION COMMISSION,
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200,

Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

and

DOUGLAS L. JONES, AS TREASURER,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

Defendants.

_____

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

JURISDICTION

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted the Federal Election Commission ("Commission" or "FEC") by provisions of the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), codified at 2 U.S.C. §§ 437d(a)(6) and 437g(a)(6)(A). This court has original jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency

of the United States expressly authorized to sue by an act of Congress.

VENUE

2. Venue is properly found in the District of Colorado, in accord with 2 U.S.C. § 437g(a)(6)(A), as the defendants can be found, reside or transact business in this district.

THE PARTIES

3. Plaintiff Federal Election Commission is the agency of the United States government empowered with exclusive and primary jurisdiction with respect to the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The FEC is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437g (a)(6).

4. Defendant Colorado Republican Federal Campaign Committee ("State Party") is a political committee within the meaning of 2 U.S.C. § 431(4) and is the federal account of the Colorado Republican State Central Committee. *See* 11 C.F.R. § 102.5(b)(1)(i). Hence the State Party is a party committee which represents a political party on the state level. *See* 11 C.F.R. § 100.5(e)(4).

5. Defendant Douglas L. Jones is the treasurer of the Colorado Republican Federal Campaign Committee. *See* 2 U.S.C. §§ 432(a), 432(c), and 434(a)(1).

STATUTES

6. 2 U.S.C. § 441a(d)(3)(A) states, *inter alia*, that a State committee of a political party may not make any

expenditure in connection with the general election campaign of a candidate for the United States Senate in that State who is affiliated with such party which exceeds the greater of 2 cents multiplied by the voting age population of the State or $20,000.

7. 2 U.S.C. § 434(b)(4)(H)(iv) states that political committees must report to the Commission, for the reporting period and the calendar year, the total amount of expenditures made under 2 U.S.C. § 441a(d).

8. 2 U.S.C. § 434(b)(6)(B)(iv) states that political committees (other than the authorized committees of candidates) must report to the Commission the name and address of each person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of any such expenditure as well as the name of, and the office sought by, the candidate on whose behalf the expenditure is made.

9. 2 U.S.C. § 441a(f) states, *inter alia*, that no political committee shall knowingly make any expenditure in violation of 2 U.S.C. § 441a, and no officer or employee of a political committee shall knowingly make any expenditure on behalf of a candidate in violation of any limitation imposed on contributions and expenditures under 2 U.S.C. § 441a.

ADMINISTRATIVE PROCEEDINGS

10. On June 12, 1986, M. Buie Seawell filed an administrative complaint on behalf of the Colorado State Democratic Party against the State Party and its treasurer. On June 19, 1986, the Commission notified the State party and its treasurer that a complaint had been filed against them. Acting upon the basis of information ascertained from the complaint and the response made thereto, the Commission, by the affirmative vote of at least four of its members, found reason to believe on November 5,

1986, that the State Party and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). The basis of this finding was that it appeared that the State Party and its treasurer had made a disbursement for a radio advertisement that appeared to be an expenditure in connection with the general election for United States Senator from Colorado in 1986, and thus said expenditure appeared to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A); the State Party and its treasurer, however, had not reported these expenditures in accordance with 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). An investigation was initiated.

11. By letter dated November 13, 1986, the State Party and its treasurer were notified of the Commission's reason to believe findings of November 5, 1986.

12. The Commission's General Counsel notified the State Party and its treasurer by letter dated November 10, 1987, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that they had violated the Act, and provided them with a brief stating the position of the General Counsel on the legal and factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). The State Party and its treasurer were provided an opportunity to respond.

13. On June 14, 1988, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that the State Party and its Treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

14. By letter dated June 23, 1988, the State Party and its treasurer were notified of the Commission's probable cause to believe findings of June 14, 1988, and a proposed conciliation agreement directed to the State Party and its treasurer was enclosed.

15. The Commission's General Counsel notified Douglas L. Jones by letter dated September 28, 1988, that the

General Counsel was prepared to recommend that the Commission find probable cause to believe that Douglas L. Jones, as treasurer of the State Party, had violated the Act, and provided him with a brief stating the position of the General Counsel in the legal and factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). Douglas L. Jones, as treasurer, was provided an opportunity to respond.

16. On January 10, 1989, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that Douglas L. Jones, as treasurer of the State Party, violated 2 U.S.C. §§434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

17. By letter dated January 17, 1989, the State Party and Douglas L. Jones, as treasurer, were notified of the Commission's probable cause to believe findings of January 10, 1989, and a proposed conciliation agreement directed to the State Party and Douglas L. Jones, as treasurer, was enclosed.

18. The Commission endeavored for a period of not less than thirty (30) days to correct the violation by informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the defendants in accordance with 2 U.S.C. § 437g(a)(4)(A).

19. On April 7, 1989, after failing to reach an agreement with the State Party and Douglas L. Jones, as treasurer, the Commission, by the affirmative vote of at least four of its members, authorized, pursuant to 2 U.S.C. § 437g(a)(6)(A), the filing of a civil suit against the defendants in the United States District Court.

20. Thereafter, the defendants were notified by letter dated April 10, 1989, of the Commission's authorization of the instant civil action.

21. The Commission has met all of the jurisdictional prerequisites for filing this suit.

STATEMENT OF CLAIM

COUNT 1

22. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 21, inclusive.

23. Defendants were prohibited by 2 U.S.C. § 441a (d)(3)(A), from making expenditures in connection with the 1986 general election campaign of a candidate for United States Senator from Colorado in excess of an amount equal to 2 cents multiplied by the voting age population of the State, which amount was $103,248.

24. Defendants assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee.

25. On April 2, 1986, defendants made an expenditure of $15,000 to pay for a radio advertisement, known as "Wirth Facts #1." The text of this advertisement was as follows:

> "Paid for by the Colorado Republican State Central Committee.
>
> "Here in Colorado we're use [sic] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> "Tim Wirth has a right to run for Senate, but he doesn't have a right to change the facts."

26. "Wirth Facts #1" was aired during the period between April 2, 1986 and August 12, 1986. During that

period, Tim Wirth was a Member of the United States House of Representatives and a Democratic candidate for the United States Senate. He had no opposition for the Democratic party nomination for the United States Senate in the primary held August 12, 1986. In that primary, he was nominated by the Democratic party for the office of United States Senator, and ran in the general election as the opponent of the Republican party candidate for United States Senator.

27. Defendants' expenditure of $15,000 to pay for the radio advertisement known as "Wirth Facts #1" was made in connection with the 1986 general election for the United States Senate in Colorado.

28. Defendants' expenditure of $15,000 to pay for "Wirth Facts #1" was an expenditure made by the State committee of a political party that was subject to 2 U.S.C. § 441a(d).

29. Defendants did not report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) as required by 2 U.S.C. § 434(b)(4)(H)(iv).

30. Defendants' failure to report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a (d) violated 2 U.S.C. § 434(b)(4)(H)(iv).

COUNT 2

31. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

32. Defendants were required by 2 U.S.C. § 434(b) (6)(B)(iv) to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure,

as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

33. Defendants did not report to the Commission, with respect to their expenditure for "Wirth Facts #1," the name and address of each person who received said expenditure from the State Party, the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

34. Defendants' failure to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made, violated 2 U.S.C. § 434(b)(6)(B)(iv).

COUNT 3

35. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

36. Defendants' expenditure of $15,000 in connection with the 1986 general election for U.S. Senator from Colorado pursuant to 2 U.S.C. § 441a(d) was in excess of the limitation on the amount of such contributions set forth at 2 U.S.C. § 441a(d)(3)(A)(i), in that defendants had assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee, and therefore defendants could no longer make such expenditures.

37. Defendants violated 2 U.S.C. § 441a(f) by making an expenditure in excess of the limitation set forth at 2 U.S.C. § 441a(d)(3)(A)(i).

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission prays that this Court:

(1) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 434(b)(4)(H)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(2) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(3) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 441a(f) by making an expenditure in connection with a general election campaign for federal office in excess of a limitation set forth at 2 U.S.C. § 441a.

(4) Assess against defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, a civil penalty of the greater of five thousand dollars ($5000) or an amount equal to 100 percent of the amounts involved in each of the violations committed, pursuant to 2 U.S.C. § 437g(a)(6)(B), for which defendants shall be jointly and severally liable;

(5) Permanently enjoin each defendant from similar future violations of the Federal Election Campaign Act of 1971, as amended; and

(6) Award the plaintiff Federal Election Commission such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Ivan Rivera
IVAN RIVERA
Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

For the Plaintiff
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

July 5, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

DEFENDANTS' ANSWER AND COUNTERCLAIMS

NOW COMES the Defendants in the above-captioned action, Colorado Republican Federal Campaign Committee ("the State Party") and Douglas L. Jones, as treasurer, and hereby answer the complaint of the Federal Election Commission ("FEC") a follows:

JURISDICTION

1. Paragraph 1 contains allegations of law as to which no responsive pleading is required.

VENUE

2. Venue is not contested.

PARTIES

3. Defendants admit the allegations in paragraph 3 of the complaint.

4. Defendants admit the allegations in paragraph 4 of the complaint.

5. Defendants admit the allegations in paragraph 5 of the complaint.

STATUTES

6. Paragraph 6 contains allegations of law as to which no responsive pleading is required.

7. Paragraph 7 contains allegations of law as to which no responsive pleading is required.

8. Paragraph 8 contains allegations of law as to which no responsive pleading is required.

9. Paragraph 9 contains allegations of law as to which no responsive pleading is required.

ADMINISTRATIVE PROCEEDINGS

10. With respect to the allegations in paragraph 10, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo, that an administrative complaint had been filed against it (see Exhibit 1 attached). In addition, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo, that it had determined there was reason to believe that they violated 2 U.S.C. § 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) with respect to a radio advertisement discussing defense issues. The FEC also notified the State Party and its treasurer that it had "failed to pass a motion to find reason to believe" that the State Party and its treasurer, Vincent Zarlengo, had violated 2 U.S.C. § 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with other advertisements noted in the complaint. The State Party denies that it had not reported the expenditures for these radio advertisements. Defendants admit that an investigation was initiated. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 10, and therefore deny the same.

11. With respect to the allegations in paragraph 11, Defendants admit that by letter dated November 13, 1986, the State Party and its treasurer, Vincent Zarlengo, were notified of the Commission's reason to believe findings of November 5, 1986. (See Exhibit 2 attached).

12. With respect to the allegations in paragraph 12, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo that the General Counsel was prepared to recommend that the Commission find probable cause to believe that a violation has occurred, and further admit that they were provided an opportunity to respond.

13. Wtih respect to the allegations in paragraph 13, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore deny the same.

14. With respect to the allegations in paragraph 14, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo that it had found probable cause to believe that they violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), and further admit that a proposed conciliation agreement was enclosed.

15. With respect to the allegations in paragraph 15, Defendants admit that the FEC notified the State Party and its treasurer, Vincent Zarlengo that the General Counsel intended to recommend probable cause to believe that Douglas L. Jones, as new treasurer of the State Party, had violated the Act, and further admit that Douglas L. Jones, as treasurer, was provided an opportunity to respond.

16. With respect to the allegations in paragraph 16, Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations, and therefore deny the same.

17. With respect to the allegations in paragraph 17, Defendants admit that the FEC notified the State Party and its new treasurer, Douglas L. Jones, that it had found probable cause to believe Douglas L. Jones violated the Act, and further admit that a proposed conciliation agreement was enclosed.

18. With respect to the allegations in paragraph 18, Defendants admit that the FEC endeavored to enter into a conciliation agreement in accordance with 2 U.S.C. § 437g(a)(6)(A).

19. With respect to the allegations in paragraph 19, Defendants admit that the FEC did not reach an agreement with the State Party and its new treasurer, Douglas

L. Jones. However, Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 18, and therefore deny the same.

20. With regard to the allegations in paragraph 20, Defendants admit that the FEC notified the State Party by letter dated April 10, 1989 that the Commission authorized the General Counsel to institute a civil action for relief in the United States District Court.

21. Paragraph 21 contains allegations of law as to which no responsive pleading is required.

STATEMENT OF CLAIM

COUNT 1

22. Paragraph 22 contains no allegations as to which a responsive pleading is required.

23. With respect to the allegations in paragraph 23, Defendants admit that the 2 U.S.C. § 441a(d)(3)(A) limitation for the Office of Senate in the State of Colorado was $103,248 in connection with the general election campaign of the candidate for the office of Senate affiliated with the party.

24. With respect to the allegations in paragraph 24, Defendants admit that the Colorado Republican Party authorized the National Republican Senatorial Committee to serve as its agent for the purpose of making expenditures allowed under 2 U.S.C. § 441a(d)(3) in connection with the general election campaign of its candidate for United States Senate.

25. With respect to the allegations in paragraph 25, Defendants admit that the State Party made an expenditure of $15,000 to pay for a radio advertisement, known as "Wirth Facts #1" and further admits that the text of the advertisement was as alleged.

26. With respect to the allegations in paragraph 26, Defendant's deny that "Wirth Facts #1" was aired during the period between April 2, 1986 and August 12, 1986. "Wirth Facts #1" was aired between April 4, 1986 and April 13, 1986. Defendants admit that Tim Wirth was a Member of the United States House of Representatives. Defendants deny that at the time of the advertisement that Tim Wirth was an official candidate of the Democratic Party for the Office of United States Senate under the laws of Colorado. Defendants deny that Tim Wirth had no opposition for the Democratic Party nomination for the United States Senate and aver that he was opposed by David Grace. Defendants admit that the Democratic primary was held on August 12, 1986. Defendants admit that Tim Wirth was nominated by the Democratic Party in its August 12, 1986 primary for the office of United States Senator and that he ran for United States Senator in the general election and was opposed by a candidate nominated by the Republican Party on August 12, 1986.

27. With respect to the allegations in paragraph 27, Defendants deny that the State Party's expenditure of $15,000 to pay for the radio advertisement known as "Wirth Facts #1" was made in connection with the 1986 general election for the United States Senate in Colorado. The State Party's expenditure was an operating expenditure of the State Party and reported as such.

28. With respect to the allegations in paragraph 26, Defendants deny that the State Party's expenditure of $15,000 to pay for "Wirth Facts #1" was an expenditure made by the State committee of a political party that was subject to 2 U.S.C. § 441a(d).

29. With respect to the allegations in paragraph 29, Defendants deny that the State Party did not report the expenditure of $15,000 paid for Wirth Facts #1 to the Commission and further denies that it made an expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) which

was reportable pursuant to 2 U.S.C. § 434(b)(4)(H)(iv).

30. With respect to the allegations in paragraph 30, Defendants deny that they violated 2 U.S.C. § 434(b)(4)(H)(iv).

COUNT 2

31. Paragraph 31 contains no allegations as to which a responsive pleading is required.

32. Paragraph 32 contains allegations of law as to which no responsive pleading is required.

33. With respect to the allegations in paragraph 33, Defendants deny that the State Party did not report to the Commission, with respect to its expenditure for "Wirth Facts #1," the name and address of each person who received said expenditure from the State Party, the date, amount, and purpose of such expenditure. Defendants further deny that the State Party was required to identify the name of, and office sought of any candidate. Defendants deny all further allegations of Paragraph 33.

34. With respect to the allegations in paragraph 34, Defendants deny that they violated 2 U.S.C. § 434(b)(6)(B)(iv).

COUNT 3

35. Paragraph 35 contains no allegation as to which a responsive pleading is required.

36. With respect to the allegations in paragraph 36, Defendant's deny that its expenditure of $15,000 for "Wirth Facts #1" was made in connection with the 1986 general election for U.S. Senator from Colorado. Defendants admit that the Colorado Republican Party authorized the National Republican Senatorial Committee to serve as its agents for the purpose of making expenditures under 2 U.S.C. § 441a(d)(3) but deny all further allegations of paragraph 36.

37. With respect to the allegations in paragraph 37, Defendants deny that they violated 2 U.S.C. § 441a(f).

PRAYER FOR RELIEF

No answer is required.

ADDITIONAL DEFENSES

38. The complaint fails to state a claim upon which relief can be granted, and the State Party, and Douglas L. Jones, as treasurer are entitled to judgment in their favor as a matter of law.

39. The State Party has not violated 2 U.S.C. § 441a(f) because its disbursements for "Wirth Facts #1" are not subject to 2 U.S.C. § 441a(d) limits.

40. The State Party's disbursements are not subject to the limits of 2 U.S.C. § 441a(d) because its disbursements for "Wirth Facts #1" was not made "in connection with" a "general election."

41. The State Party's disbursements are not subject to the limits of 2 U.S.C. § 441a(d) because the disbursement did not benefit any candidate for general election.

42. The State Party fully reported the expenditures for "Wirth Facts #1" as required by the Federal Election Campaign Act of 1971, as amended.

43. The State Party has not violated 2 U.S.C. § 434(b)(4)(H)(iv) with respect to this expenditure because it has not made an expenditure pursuant to 2 U.S.C. § 441a(d).

44. The State Party has not violated 2 U.S.C. § 434(b)(6)(B)(iv) because it has not made an expenditure pursuant to 2 U.S.C. § 441a(d).

45. 2 U.S.C. § 441a(d) is unconstitutional on its face as a vague and overbroad infringement on the freedom of speech and association guaranteed to the State Party by the First Amendment to the United States Constitution.

46. If 2 U.S.C. § 441a(d) is construed to prohibit the State Party's expenditure for an advertisement criticizing an incumbent congressman, then that section is unconstitutional as applied because it violates the freedom of speech and association guaranteed to the State Party by the First Amendment to the United States Constitution.

COMPULSORY COUNTERCLAIM

47. The State Party seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. § 441a(d) are unconstitutional, both facially and as applied, and appropriate further relief pursuant to 28 U.S.C. § 2202 and other applicable statutes. This court has original jurisdiction of this counterclaim pursuant to 28 U.S.C. § 1331 and its pendent and ancillary jurisdiction.

48. The State Party could and would have made expenditures directly in connection with the general election campaign for the Office of United States Senator from the State of Colorado that exceeded the limits established by 2 U.S.C. § 441a(d), but for the deterrent and chilling effect of the statutory prohibition on such expenditures. Moreover, the State Party could and would make such expenditures in connection with future general campaigns but for the deterrent and chilling effect of those limits.

49. The radio advertisement known as "Wirth Facts #1" was one of several such advertisements concerning Tim Wirth that were purchased and aired by the State Party at approximately the same time. The FEC found a violation with respect to "Wirth Facts #1," and not the other such advertisements, solely because of the content of "Wirth Facts #1."

50. The spending limits established by 2 U.S.C. § 441a(d) restrict political speech by political bodies such as the State Party concerning political subjects on the

basis of content in violation of the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution.

51. The spending limits established by 2 U.S.C. § 441a(d) discriminate against the State Party because of the State Party's political activities in violation of the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution.

52. The restrictions and requirements of 2 U.S.C. § 441a(d) are unconstitutionally vague and overbroad and chill and deter speech in violation of the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution.

53. The FEC denies that 2 U.S.C. § 441a(d) violates the United States Constitution as alleged above, has initiated enforcement proceedings against the State Party for an alleged violation of 2 U.S.C. § 441a(d), and will continue to enforce 2 U.S.C. § 441a(d) unless appropriate relief is granted in this proceeding.

WHEREFORE, the State Party and Douglas L. Jones, as Treasurer, pray that the court declare 2 U.S.C. § 441a (d) unconstitutional, facially and as applied; that it dismiss this action with prejudice; that it award the State Party its reasonable costs and attorneys fees; and that it award the State Party such other and further relief as the court deems just and proper.

Respectfully submitted,

/s/ Jan W. Baran
JAN W. BARAN
Thomas Kirby
Carol A. Laham
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer

August 21, 1989

EXHIBIT 1

[FEC Logo]

FEDERAL ELECTION COMMISSION
Washington, D.C. 10463

June 19, 1986

Colorado Republican State Central Committee
1275 Tremont Place
Denver, Colorado 80204

Re: MUR 2186

Dear Sir:

This letter is to notify you that the Federal Election Commission received a complaint which alleges that the Colorado Republican State Central Committee may have violated certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 2186. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against the Colorado Republican State Central Committee in this matter. Your response must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)

(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-8200. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

CHARLES N. STEELE
General Counsel

By: /s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Deputy General Counsel

Enclosures
Complaint
Procedures
Designation of Counsel Statement

COMPLAINT

BEFORE THE

FEDERAL ELECTION COMMISSION

I. INTRODUCTION

The Colorado State Democratic Party files this Complaint in order to initiate an immediate investigation of illegal spending practices by the Colorado Republican State Central Committee (the "Republican Committee"). The public record shows, and an investigation will confirm, that the Republican Committee has disregarded the legal expenditure limitations under the Federal Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. Sec. 431 *et seq.*, in its ongoing effort to secure the defeat of the likely Democratic Senate nominee, Congressman Tim Wirth, in the upcoming United States general election.

Through both direct mail and broadcast media, over a period of weeks and at considerable cost, the Republican Committee has launched wave after wave of general public criticism designed to influence voters to cast their ballots against Congressman Wirth. The Republican Committee apparently does not intend, however, to do as the law requires: account for the money so spent under appropriate FECA limitations, particularly 2 U.S.C. Sec. 441a(d)(3), applicable to general election spending.

The election is near in time, and as the weeks draw closer to election day, there is every sign that these illegal Republican Committee expenditures will continue. The State Party urges the Commission to act with all appropriate speed. The spending imbalance in the Colorado United States Senate campaign caused by these illegal expenditures is significant and only prompt agency attention to this matter can help restore some semblance of fairness and respect for law to Republican Senate campaign spending in Colorado this year.

II. THE FACTS

The United States Senate race in Colorado revolves around the Senate seat now held by retiring incumbent Senator Gary Hart. With no incumbent seeking re-election, this "open seat" for which candidates are competing is being vigorously contested. On June 7, 1986, the Republican Party nominated, from a field of 3, one candidate whose name will appear on the August 12 primary ballot. On the same day, the Democratic Party also nominated a single candidate.

The Republican Party—both the national party and the state party—view Colorado as an excellent opportunity to turn a formerly Democratic seat into a Republican one. As shown in the newspaper clippings contained in Attachment A, the Republicans have targeted the Colorado race as part of their attempt to maintain a Republican majority in the Senate. Vice President Bush even described the race as the "most important" for the Republicans. Attachment B. Such targeting has in the past translated into extraordinary expenditures of funds by the Republican Party under 2 U.S.C. Sec. 441a(d)(3) in support of the Republican candidate and in opposition to the Democratic nominee.

These expenditures have already begun in Colorado. The Republican Comimttee has to date published at least two brochures and run three radio spots attacking Congressman Tim Wirth, who is the only candidate seeking the nomination of the Democratic Party for the United States Senate. The first spot and brochure citicize Congressman Wirth's voting record on defense ("Defense Ad"). The second and third spots and second brochure are concerned with Congressman Wirth's position on the AT & T divestiture ("Telephone Ad").[1] Copies of the brochures and the text of the radio spots are appended to

[1] For convenience, throughout this complaint, both the brochures and radio spots will be referred to collectively as "The Ads".

this complaint as Attachment C (Defense Ad) and Attachment D (Telephone Ad).

The Ads have been widely disseminated around Colorado. The Defense Ad, by the Republican Committee's own estimate, was mailed to over 100,000 Colorado voters at a cost of more than $15,000; the cost of the defense radio ad was reported to be $15,000 as well. The two ads together represent, therefore, a total of $30,000 in expenditures by the Republican Committee. Attachment E. The Telephone Ad in brochure form has been distributed to a similar number of voters and its media counterpart aired on 30 statewide radio stations at a total cost of approximately $30,000. Attachment F.

These are only the most publicized of the Republican Committee's activities against Congressman Wirth. Other mailings by the Republican Committee have been cited in the press reports. *See, e.g.*, Attachment G. Assuming these other mailings were distributed in a manner familiar to The Ads, the cost would be at a minimum an additional $15,000.

In any event, the Republican Committee, by its own admission, has spent in excess of $60,000 to attack Congressman Wirth. To date (through the April 15 Quarterly Report), reports filed with the Federal Election Commission ("FEC") by the Republican Committee show no disclosures of coordinated expenditures (2 U.S.C. Sec. 441a(d)) to reflect the benefit derived from The Ads by the Republican nominee. As will be shown in the discussion below, failure by the Republican Committee to account under lawful limits for these coordinated expenditures—and to report them—would constitute clear violations of the FECA which, if uncorrected, will result in the Republican nominee receiving funding far in excess of the legal allowance.

III. THE LAW

Section 441a(d)(3) of the Federal Election Campaign Act operates as a limitation on the expenditures made by

political party committees in connection with the general election campaigns of their nominees for the United States Senate. Among the political party committees entitled to these special spending privileges are the "state committees" of each political party. In the State of Colorado, for purposes of this Complaint and on all other relevant occasions, the "state committee" of the Republican Party in the State of Colorado is the Republican State Central Committee named as Respondent in this action.

The spending rights of political parties like the Republican Committee are well defined under the law. The Republican Committee may make direct or indirect contributions to candidates, in amounts not exceeding $5,000 per election. 2 U.S.C. Sec. 441a(a)(2). It may make coordinated Sec. 441a(d) expenditures on its nominee's behalf. Also, the Republican Committee could somewhat supplement the total dollars expended in connection with the Senate general election campaign, by making certain "exempt" expenditures in support of the general election nominee in accordance with the terms and conditions of the volunteer campaign materials, slate card and other relevant exemptions. See, e,g., 2 U.S.C. Sec. 431(8)(B)(v), (x) & (xii); 2 U.S.C. Sec. 431(9)(B)(iv), (viii) and (ix).

These are the only choices available to the Republican Committee in expending funds specifically to promote the election of its nominee or the defeat of the Democratic nominee for the United States Senate. It is significant that regulations of the Federal Election Commission specifically prohibit political parties from undertaking "independent" expenditures in support of their candidates in the general election. 11 C.F.R. Sec. 110.7(a)(5) & (b)(4). *See also* A.O. 1984-15 and A.O. 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 5766, 5561. This prohibition serves to impose Sec. 441a(a) or Sec. 441a(d) limitations on any spending which might otherwise

appear "independent" in nature but which cannot be so treated because the spending entity is a state party.

IV. DISCUSSION

The Republican Committee is apparently attempting to steer clear of lawful limitations on any of its aggressive anti-Wirth spending.[2] The Committee appears to assume a right to make independent expenditures, or at least quasi-independent expenditures, in opposition to the Wirth candidacy. The advertisements financed by the Committee through direct mail or broadcast media specifically identify Congressman Wirth and the texts of these advertisements, in fact, are organized entirely around derogatory claims about his record. Those same advertisements make it clear that their purpose is to influence voter perceptions about Congressman Wirth's Senate candidacy. Public statements by Republican Committee officials about this anti-Wirth campaign confirm that it has this purpose and only this purpose. It is equally obvious from the text of these advertisements that the perception that their authors hope to generate among Colorado voters would not be favorable to Congressman Wirth.

The Commission has already addressed and resolved this issue in Advisory Opinions 1984-15 and 1985-14. 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 5819, 5766. Both these opinions address the issue of spending by party committees in opposition to the other party's candidate(s) before their own nominee has been selected. In both cases, the FEC found that certain types of spending for this purpose was attributable to Sec. 441a(d) limits. The spending subject to these rulings and held accountable to limits is identical in character to the Republican Committee's spending to defeat Congressman Wirth in the general election.

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[2] *See* n [1] 5, *infra*.

1. Advisory Opinion 1984-15

Advisory Opinion 1984-15 involved advertisements proposed by the Republican National Committee in connection with the 1984 Presidential elections. The advertisements would have aired before and after the Democratic Party nominating convention, but before the selection of the Republican nominee (who was, of course, not in doubt). They would have featured a prominent candidate for the Democratic nomination and would have contained statements attacking the candidate's positions on issues and his record.

~~T~~The FEC first held that the ads could be considered Sec. 441a(d) coordinated expenditures, since "nothing in the Act, its legislative history, Commission regulations or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." The test propounded by the FEC to determine whether expenditures would, in fact, count toward Sec. 441a(d) limits was whether the expenditures were made "for the purpose of influencing the outcome of the general election. . . ."

As the FEC made clear in this ruling, expenditures made with a genuine general election-influencing purpose count against Sec. 441a(d) limits regardless of whether a nominee has been selected or even clearly identified. The FEC stated: "(W)hether a specific nominee has been chosen, or a candidate assured of nomination, at the time the expenditure is made, is immaterial." [3] The Commission therefore concluded that the ads proposed by the Republicans required allocation to Sec. 441a(d) limits since

[3] The FEC has frequently noted also that a party committee need not coordinate Sec. 441a(d) expenditures with its own nominee for the Senate and thus can make such expenditures before its nominee is selected. *See, e.g.*, A.O. 1975-120, 1 Fed. Elec. Camp. Fin. Guide (CCH) Para. 5186.

> (t)he clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party . . . nominee and to garner support for whoever may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to (a single federal office) and seek to influence a voter's choice between the Republican Party . . . candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. The only election which will pose such a choice is the . . . general election. These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election.

(Citation omitted.) Because the expenditures were made to benefit the eventual nominee in the general election, they must be allocated to Sec. 441a(d) limits.[4]

In holding that Sec. 441a(d) limits applied, the FEC distinguished so-called "generic" party building advertisements. Such ads do not count toward limitations attributable to any particular candidate, but these ads may not identify "by visual or audio content . . . any specific candidate or office." The facts of this Complaint simply do not support any attempted argument by the Republican Committee that The Ads are in any way "generic." [5]

[4] *See also* 11 C.F.R. Sec. 106.1(a) (Expenditures on behalf of candidates must be attributed "in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived.")

[5] It is of political significance that in April of this year, the Republican Committee responded to an FEC inquiry into whether certain expenditures reflected on its year-end report required allocation to a specific candidate. The Republican Committee denied that allocation was required, on the ground that the expenditures in question involved "voter education" relating to the 1986 general election at a time when there were no candidates for federal office in that election. Of course, if (as may well be the case) some of these

The similarity of the facts of this complaint to those underlying the main holding of the Advisory Opinion is striking. The Ads involve an attack on the record and positions of a clearly identified [6] candidate of the opposition party for a single office the United States Senate. Although made before a nominee had been selected by either party, the clear purpose of the ads is to influence the general election, since voters will not have an opportunity to decide between the Democratic and Republican nominees until the general election.[7]

1. Advisory Opinion 1985-14

A ruling by the FEC subsequent to Advisory Opinion 1984-15, Advisory Opinion 1985-14, confirms the teaching of the former. There, the Democrats proposed certain media ads and direct mailings critical of the Republican Party and, in some cases, particular Members of Con-

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expenditures were made to prepare for the anti-Wirth campaign undertaken this year, the Republican Committee is wholly wrong about the legal consequences of its acts. The funds spent for this campaign, whenever spent, are allocable to the Sec. 441a(d) general election spending limit.

[6] "Clearly identified" is defined by FEC regulations as an "unambiguous reference," such as where the name of a candidate appears. 11 C.F.R. Sec. 100.17.

[7] The one distinction between the facts of A.O. 1984-15 and of this Complaint is, in the Commission's words, "immaterial." In A.O. 1984-15, the candidate seeking the nomination of the Republican Party, the party making the ads, was assured of the nomination, while the candidate against whom the ads were to be made was arguably involved in a contested nomination. Here, the candidate against whom the ads have been made is apparently assured of the nomination, while there were several candidates seeking the Republican nomination. The holding of the Opinion applies to either set of facts: where the expenditures are for the purpose of influencing the general election, as they must be where nongeneric ads are run criticizing a potential opponent in the general election, Sec. 441a(d) limits apply. The benefit to the Republican nominee in this case is indisputable.

gress. The Comission concluded generally that ads which did not identify a particular Congressman, office or election, would qualify as generic party building expenditures, not subject to any limitation.[8]

Where, however, the proposed direct mailing involved reference to a particular Member of Congress by name, and distribution within "all or part" of that Member's Congressional District, the FEC concluded that the

> expenditures for producing and disseminating the mailer either with or without the "Vote Democratic" statement will be subject to the Act's limitations and attributable pursuant to 11 C.F.R. 106.1.

The ruling is unequivocal: direct mail such as that directed by Respondent against Congressman Wirth is allocable to limits where it identifies by name the candidate under attack, critiques his or her performance in office or position on issues, and its distribution to the voting constituency."

In so holding, the FEC noted that the declared purpose of the mailing, stated by the Democratic party committee requesting the Advisory Opinion, was to "influenc(e) voter perceptions of these candidates with a view toward weakening their positions as candadates for reelection." This purpose, together with the identification of a particular Member, requires a finding that the spending is attributable to the limits of Sec. 441a(d) under the criteria set out in Advisory Opinion 1984-15.

It is important to note that there is no requirement in either Advisory Opinion 1984-15 or Advisory Opinion 1985-14 that the advertisement, to be attributable, must contain "express advocacy." "Express advocacy" is a term

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[8] The one exception was the proposed advertisement which referred to "Your Republican Congressman" and included the tag line "Vote Democratic". In this case, the FEC vote was split 3-3 and the Opinion did not reach the issue.

of art under the FECA, 11 C.F.R. 109.1(b)(2). In Advisory Opinion 1984-15, the FEC recognized that an advertisement was attributable where it "effectively" advocated the defeat of a candidate. In Advisory Opinion 1985-14, the FEC, interpreting Advisory Opinion 1984-15, stated the requirement that an allocable communication include "an electioneering message." The Opinion, in turn, defined "electioneering message" as one "designed to urge the public to elect a certain candidate or party," *citing United States v. United Auto Workers*, 352 U.S. 567, 587 (1957). On the facts of that particular case, the FEC identified a clear "electioneering message" in direct mailings which clearly identified a Member of Congress and which were distributed within the Member's district with the stated purpose of influencing his or her re-election prospects.

The Republican Committee ads which form the basis of this complaint clearly fall within this category of expenditures—and must be attributed to limitations under the FECA. The Ads identify and criticize Congressman Wirth unambiguously and have been distributed to 100,000 voters throughout Colorado. Since the Senate race involves a state-wide election, this distribution is directed toward the electorate that will be asked to choose between the Republican and Democratic nominees in the United States Senate general election.

Further, The Ads were aired and distributed by the Republican Committee with the clear purpose to influence the general election, by attacking Congressman Wirth—a candidate whom the party will not directly oppose until the general election. Attachment H. Douglas Goodyear, the Republican political director in Colorado, is reported in a May 21, 1986 Associated Press article to have described the Phone Ads as designed as "a diversion (which) gives the GOP time to select a candidate to face Wirth in the general election campaign." Attachment 1.

V. CONCLUSION

This Complaint does not present complex legal issues. It presents a single issue of compliance by the Republican Committee with Sec. 441a(d) limits on its general election spending. The FEC has ruled on precisely this issue. It has done so twice and in the clearest of terms. This precedent is binding on the Republican Committee which cannot conceivably, on indisputable facts, avoid the application of general election spending limits to its anti-Wirth spending.

Under those circumstances, the FEC must not delay in holding the Respondent to these limits. This case should be prosecuted on an expedited basis to assure that these limits are observed from now through Election Day. The amount spent by the Republican Committee to date on these anti-Wirth advertisements must be determined to the dollar and then deducted from the limit still available to the Republican Party under Sec. 441a (d) to influence the Colorado Senate race.

Moreover, because the law is clear, service by the FEC of this complaint on the Respondent should operate as notice that its spending is accountable under Sec. 441a (d). From that day forward, *any* spending by the Republican Committee in defiance of those limits will be viewed by Complainant as a knowing and wilful violation of the FECA requiring FEC referral to the Justice Department or, at the least, an agency finding of aggravated wilful misconduct together with the imposition of appropriately severe remedial action as provided in such cases under the statute. 2 U.S.C. Sec. 437g(d)(1). Complainant will pursue this matter fully in cooperation with the FEC until Respondent obeys the law.

On the basis of the foregoing, the Colorado State Democratic Party requests that the FEC:

1. Conduct on an expedited basis an investigation of the facts and determine the exact dollar

amounts of the anti-Wirth spending by the Republican Committee;

2. Enter into a prompt conciliation with Respondents to remedy the violations alleged in this Complaint, and most importantly, to assure that the expenditures made to date are accounted for under Sec. 441a(d) limits and that the Respondent is notified that its remaining Sec. 441a(d) limit is no more than the difference between these expenditures and the published Sec. 441a (d) limits; and
3. Impose any and all penalties grounded in violations alleged in this Complaint.

Respectfully submitted,

/s/ M. Buie Seawell
Colorado State Democratic Party

[Notary Omitted in Printing]

[FEC Logo]

FELERAL ELECTION COMMISSION
Washington, D.C. 20463

November 13, 1986

Jan Baran, Esquire
Wiley & Rein
1776 K Street N.W.
Washington, D.C. 20006

RE: MUR 2186
The Colorado Republican
Federal Campaign Committee and
Vincent Zarlengo, as treasurer

Dear Mr. Baran:

The Federal Election Commission previously notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on November 5, 1986, determined that there is reason to believe that your clients have violated provisions of the Act.

Specifically, it appears that the disbursements made by your clients for a radio advertisement discussing defense issues (*See* Complaint at Attachment C) were found to be expenditures in connection with the general election for senator in the State of Colorado, and thus appear to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A). Thus, the Commission found reason to believe the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Additionally, the Commission considered allegations regarding other ads noted in the com-

plaint, but failed to pass a motion to find reason to believe your clients violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with these ads.

Your response to the Commission's initial notification of this complaint did not provide complete information regarding the matters in question. Please submit answers to the enclosed questions and the requested documents within fifteen days of receipt of this letter. Statements should be submitted under oath.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of General Counsel is not authorized to give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Patty Reilly, attorney assigned to this matter, at 376-8200.

Sincerely,

/s/ Joan D. Aikens
JOAN D. AIKENS
Chairman

Enclosures
Procedures
Questions and Document Request

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

PLAINTIFF FEDERAL ELECTION COMMISSION'S REPLY TO DEFENDANTS' COUNTERCLAIM

I. The plaintiff Federal Election Commission ("the Commission" or "FEC"), through its undersigned counsel, responds as follows to the counterclaim asserted by defendants, the Colorado Republican Federal Campaign Committee, *et al.*, in this litigation:

COMPULSORY COUNTERCLAIM

47. Paragraph 47 of defendants' Answer contains conclusions of the pleaders, including conclusions of law, and defendants' characterizations of the matters of which they complain. With respect to those conclusions and characterizations, no response is required. To the extent that a response may be deemed necessary, however, plaintiff denies that this Court has original jurisdiction of this counterclaim pursuant to 28 U.S.C. § 1331 and its pendent and ancillary jurisdiction.

48. In response to Paragraph 48 of defendants' Answer, the plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment that defendants could or would have made expenditures directly in connection with the general election campaign for the Office of United States Senator from the State of Colorado that exceeded the limits established by 2 U.S.C. § 441a(d), other than with respect to those expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado in excess of the limits of 2 U.S.C. § 441a(d) that defendants did make. With respect to the averment that defendants could and would make such expenditures in connection with future general election campaigns, the Commission is without knowledge or information sufficient to form a belief as to the truth of the averment. All other allegations in Paragraph 48 are denied.

49. In response to Paragraph 49, plaintiff admits that the radio advertisement known as Wirth Facts #1 was one of several advertisements concerning Tim Wirth that were purchased and aired by the defendants during approximately the same time period. Plaintiff denies the remainder of the allegations of Pargraph 49 of defendants' Answer.

50. Paragraph 50 of defendants' Answer includes statements of law not requiring a response, and each and every other averment therein is denied.

51. Paragraph 51 of defendants' Answer includes statements of law not requiring a response, and each and every other averment therein is denied.

52. Paragraph 52 of defendants' Answer includes statements of law not requiring a response, and each and every other averment therein is denied.

53. As to Paragraph 53 of defendants' Answer, the allegation that the Commission has initiated enforcement proceedings against the State Party for an alleged violation of 2 U.S.C. § 441a(d) is denied. Plaintiff admits that, in a matter under review with the Commission that arose from an administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g(a)(1), the FEC found probable cause to believe that the State Party and Douglas L. Jones, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). Plaintiff admits that 2 U.S.C. § 441a(d) does not violate the United States Constitution and that the Commission has a continuing obligation to enforce the Federal Election Campaign Act, of which 2 U.S.C. § 441a(d) is a part. All other allegations contained in Paragraph 53 are denied.

II. Plaintiff further denies all allegations, in the counterclaim not heretofore admitted or denied, or to which plaintiff has not specifically responded, and pleads the following affirmative defenses:

1. The Court is without subject matter jurisdiction with respect to defendants' counterclaim;

2. Defendants' counterclaim fails to state a claim upon which relief can be granted.

3. Defendants' counterclaim is barred by sovereign immunity.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission requests the Court to:

1. Enter judgment in favor of plaintiff Federal Election Commission and dismiss defendants' counterclaim in its entirety;

2. Award the Commission its costs in this litigation; and

3. Grant the Commisison such other and further relief as may be appropriate.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Ivan Rivera
IVAN RIVERA
Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

For the Plaintiff
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

October 19, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

STATEMENT OF UNDISPUTED FACTS AND SUPPORTING EXHIBITS

Defendants Colorado Republican Federal Campaign Committee ("State Party") and its treasurer, Douglas L. Jones, in support of their motion for summary judgment submit the following statements of undisputed facts and citations to supporting Exhibits, attached hereto. An Exhibits Index follows for reference.

STATEMENTS OF UNDISPUTED FACTS
AND CITATION TO SUPPORTING EXHIBITS

1. The State Party is an unincorporated political association, funded by voluntary contributions from individuals who support its purpose of advancing the goals and values of the Republican Party. *See* Exhibit 6, at p. 9.

2. In early 1986, the State Party became aware that Democratic Congressman Tim Wirth was aggressively attempting to mislead Coloradans as to his official conduct in Washington, claiming that he had favored conservative Republican positions when, in fact, he had pursued liberal Democratic policies. *See* Exhibit 8.

3. The State Party responded with three radio ads and two pamphlets setting the record straight and calling on Congressman Wirth to stop dissembling as to his official conduct. *See* Exhibits 2 and 8.

4. Wirth Facts #1 was aired only between April 4 and April 13, 1986. *See* Exhibit 4, Attachment 6 and Exhibit 5, Admission 12.

5. The primary election contest for the nominees for United States Senator in both the Republican and Democratic Parties was held on August 12, 1986. *See* Exhibit 5, Admission 11.

6. The General election for the office of United States Senator from Colorado was held on November 4, 1986.

7. The text of Wirth Facts #1 was as follows:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.
>
> *See* Exhibit 2, Attachment C.

8. The State Party paid $15,000 to air this advertisement, and reported this payment in its disclosure reports on file with the Federal Election Commission. *See* Exhibit 4, Response to Interrogatory No. 6 and Attachment 6.

9. The text of the ("Wirth Facts #2") second radio ad was as follows:

> Ringing phone.
>
> Voice: "When it comes to telephone service, a lot has changed in the last few years—none of it for the better."
>
> Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion.

So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial Tone.

See Exhibit 2, Attachment D.

10. The text of the third radio ad ("Wirth Facts #3") was as follows:

Paid for by the Colorado Republican State Central Committee

There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R. 5158 gave "legislative sanction to the divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking-up the phone company was a bad idea, but as far as we could tell that's what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts."

See Exhibit II, Attachment 10

11. The Commission does not dispute that the information communicated by the State Party's materials was accurate, fair, and important. *See* Exhibit 5, p. 5.

12. On June 12, 1986, two months before the Democratic Primary, the Colorado Democratic Party filed a complaint asserting that each of the advertisements were subject to 2 U.S.C. § 441a(d)(3) and that the State Party thus violated the Act. *See* Exhibit 2.

13. Defendants responded to the complaint and the Commission's findings showing that Wirth Facts #1 was not subject to 2 U.S.C. § 441a(d)(3), and that if it was, the limits imposed by section 441a(d)(3) were unconstitutional, both facially and as applied. *See* Exhibits 11 & 12.

14. The Federal Election Commission reviewed the Complaint, and conducted an investigation, and concluded on a divided vote that "Wirth Facts #1" reflected an "expenditure in connection with the general election campaign" that was held in November, seven months after the ad last ran, and thus fell within Section 441a(d)(3) of the Federal Election Campaign Act of 1971, as amended ("Act"), 2 U.S.C. 441a(d)(3). *See* Exhibit 7.

15. 2 U.S.C. § 441a(d) states that:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a state who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator . . .
>
> (i) 2 cents multiplied by the voting age population of the State. . . .

16. The State Party assigned its Section 441a(d)(3) spending limit to the National Republican Senatorial Committee ("NRSC"). *See* Exhibit 4.

17. Because the State Party had assigned to the NRSC the limited amount of expenditures allowed to it by Section 441a(d)(3), the Commission concluded that the expenditure for Wirth Facts #1 only was excessive under Section 441a(f). *See* Exhibits 2 and 7.

18. The Commission concluded that the State Committee's financial reports had misclassified the payment for Wirth Facts #1 in violation of Sections 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). *See* Exhibit 7.

19. The Commission voted 3-3 on the issue of whether there was reason to believe that the other ads violated 2 U.S.C. § 441a(f). *See* Exhibit 7.

20. 2 U.S.C. § 434(b)(4)(H)(v) states that a political committee must report "any other disbursements" not otherwise covered by the reporting provisions of the Act. The State Party complied with this requirement. *See* Exhibit 5, Admission 10.

21. Upon being ordered by the Court to explain the basis for the Commission's different treatment of Wirth Facts #1, the best the Commission could offer was the speculation that some members of the Commission perceived an "electioneering message" in Wirth Facts #1 that they did not perceive in the other ads or pamphlets. *See* Exhibit 9.

22. The Commission was unable or unwilling to identify particular language that conveyed that "electioneering message" during the discovery process. *See* Exhibit 9.

23. The Commission is unable to identify any time during the entire term of office of Congressman Wirth that the State Party could have paid for Wirth Facts #1 without risking the charge made in this suit. *See* Exhibit 9.

24. To avoid further such charges, the State Party has been forced to refrain from political expression. *See* Exhibits 2 and 10.

25. Within the limits imposed on it by Section 441a(d)(3), the State Party regularly makes expenditures in connection with general elections for federal office either directly or by assigning its expenditure limits to the National Republican Congressional Committee or the NRSC as appropriate. *See* Exhibit 2.

26. But for those statutory limits, the State Party would have made greater expenditures in connection with the 1986 general election for U.S. Senator from Colorado, and would do so in future general elections. *See* Exhibits 2 and 10.

27. The only justification that the Commission has identified for preventing the State Party from making such additional expenditures is 'preventing actual or apparent corruption of the political process." *See* Exhibit 9.

28. There is no evidence that financial expenditures by the State Party here, or state parties in general, pose any unique or specific hazards of corruption.

29. There is no evidence that would justify limiting the amount of such spending.

30. Political action committees and individuals may make unlimited expenditures expressly advocating the election or defe[a]t of candidates in general elections for federal office.

31. Each of the documents attached hereto are fair and accurate copies of genuine originals.

Respectfully submitted,

/s/ Jan Witold Baran
JAN WITOLD BARAN
THOMAS W. KIRBY
CAROL A. LAHAM

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for the Colorado
Republican Federal Campaign
Committee and Douglas L. Jones,
as Treasurer

Date: May 14, 1990

INDEX TO EXHIBITS

COLORADO MEDIA GROUP INC.
Suite 326 . 5670 South Syracuse Circle
Englewood, Colorado 80111
(303) 779-3090

INVOICE

No: 5269

DATE: April 25, 1986

TO: Republican State Central Committee
1275 Tremont Place
Denver, CO 80204

Explanation of Services:

CRFCC Check #1166, 4-2-86 for Radio Buy	−15,000.00
Total media placed, per attached report	13,968.61
Radio production, Wirth Facts #1, 4-2-86	232.03
Station dubs (30)	129.34
Express mail (dubs to 19 stations)	204.25
Misc expenses (delivery, long distance, mileage expenses)	65.00

CREDIT BALANCE: $ −400.77

(Refund enclosed, CMG Check #1837, $400.77)

THANKS!

COLORADO MEDIA GROUP INC.

RSCC Radio Buy
Wirth Facts #1
April 4-13, 1986

Station	City	Stnd. Gross	RSCC @5%	No. Spots	Dates on Air
KOA	Denver	2550.00	2275.88	22	April 4-12
KNUS	Denver	600.00	535.50	15	April 7-13
KEZW	Denver	1080.00	963.90	40	April 4-13
KDEN	Denver	436.00	389.13	12	April 4-10
KOSI	Denver	1900.00	1695.75	12	April 4-10
KBRQ AM & FM	Denver	450.00	401.63	15	AM-April 4-10
				15	FM-April 4-10
KYGO FM	Denver	840.00	749.70	12	April 4-10
KVOD	Denver	1040.00	928.20	16	April 4-10
KLZ	Denver	635.00	566.74	12	April 4-10
KSSS-AM, KVUU-FM	Colo Spgs	1113.00	993.35	21	AM-April 7-13
				21	FM-April 7-13
Bob Hix:					
KCMN	Colo Spgs	336.00	299.88	21	April 7-13
KRLN	Canon City	178.50	159.31	21	April 7-13
KLOV	Loveland	378.00	337.37	21	April 7-13
KAYK	Pueblo	105.00	93.71	21	April 7-13

RSCC Radio Buy
Wirth Facts #1
April 4-13, 1986

Station	City	Stnd. Gross	RSCC @ 5%	No. Spots	Dates on Air
John McGuire:					
KFTM	Ft Morgan	94.00	83.90	14	April 7-13
KSLV	MonteVista	95.00	84.79	10	April 7-11
KIDN	Pueblo	192.00	171.36	12	April 7-12
KIIX	Ft Collins	192.00	171.36	12	April 7-12
KRDO AM-FM	Colo Sprgs	1175.00	1048.69	35	April 7-13
Rocky Mt Broadcast:					
KVOR-AM	Colo Sprgs	580.00	517.65	15	AM-April 7-11
& KSPZ-FM				15	FM-April 7-11
KTMG	Deertrial	50.00	44.63	15	April 7-11
KSPK	Walsenburg	38.00	33.92	5	April 7-11
KKCS Radio	Colo Sprgs	420.00	374.85	14	April 7-13
KCCY Radio	Pueblo	288.00	257.04	12	April 7-12
Intermountain Network:					
KCOL-FM	Ft Collins	299.20	267.04	16	April 7-13
KCSJ	Pueblo	185.60	165.65	16	April 7-13
KNAB	Burlington	166.40	148.51	16	April 7-13
KCRT-AM	Trinidad	76.00	67.83	16	April 7-13
KSTC-AM	Sterling	158.40	141.37	16	April 7-13
	TOTALS:	15651.10	13968.61	536	

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CHECK 1031

1837

4-25-86 CMG#5269 Refund due, RSCC Radio Buy 4-2 77-794 400.77

$ 400.77

COLORADO MEDIA GROUP, INC.
5670 South Syracuse Circle Suite 326
(303) 779-3090
Englewood, Colorado 80111

ARAPAHOE BANK AND TRUST
Englewood, Colorado 80112
82-195/1070

CHECK 1837

PAY TO THE ORDER OF Four hundred and 77-100 ---------- DATE April 25, 1986 Dollars AMOUNT $ 400.77

Colo. Republican Federal Campaign Comm.
1275 Tremont Place
Denver, CO 80204

AUTHORIZED SIGNATURE

⑈001837⑈ ⑆107001957⑆ 10 47572⑈

103

571-5792

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

PLAINTIFF FEDERAL ELECTION COMMISSION'S RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS

The plaintiff Federal Election Commission (the "Commission" or "FEC"), through its undersigned counsel, responds to defendants' first set of discovery requests in this litigation as follows:

INTERROGATORIES

1. Specify the Commission's basis for distinguishing between the advertisements known as Wirth Facts #1 and each of the other advertisements which were the subject of the complaint filed by M. Buie Seawell and designated Matter Under Review 2186.

Response. The Commission has made no finding distinguishing between Wirth Facts #1 and the other advertisements cited in the complaint.

2. Specify each compelling government interest asserted by the Commission in support of the constitutionality of 2 U.S.C. § 441a(d) and identify by document, author, title, date, and page number, each source of documentary evidence relied upon by Plaintiff to evidence each such interest.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff. Further, plaintiff objects on the grounds that the

interrogatory is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

3. Identify by date, state, names of persons involved, and documentary sources of information any examples of problems involving corruption by a State party and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is vague, confusing, vexatious, unduly burdensome, and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

4. Identify every instance in the legislative history of the Federal Election Campaign Act of 1971, as amended where Congress received evidence of corruption by a State Party.

Response. Plaintiff objects to this interrogatory on the grounds that it is vague, confusing, vexatious, unduly burdensome, and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects on the grounds that the subject matter of the discovery request, the legislative history of the Federal Election Campaign Act, consists of published reports equally accessible to defendants as to plaintiff.

5. State whether omission of the phrase "has a right to run for the Senate, but he" from Wirth Facts #1, with all other facts remaining the same, would have avoided the alleged violation of the Act.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this interrogatory on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff.

6. Identify by name and party affiliation each person whose election was advocated by Wirth Facts #1, and explain the basis for each such identification.

Response. Plaintiff objects to this interrogatory on the grounds that the text of Wirth Facts #1 speaks for itself. Plaintiff further objects on the grounds that this interrogatory seeks disclosure of the conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving these objections, plaintiff states that Wirth Facts #1 advocated the defeat of Tim Wirth.

7. Identfy each party that was active in Colorado in 1986.

Response. Plaintiff objects to this interrogatory on the grounds that it is vague, irrelevant, vexatious, unduly burdensome, and irksome. Without waiving this objection, plaintiff states that the two major parties active in Colorado in 1986 were the Republican party and the Democratic party.

8. Distinguish the status of Wirth Facts #1 under Section 441a(d) from the status of the other ads identified in the administrative complaint, explaining in detail why one and not the others led to the present charges.

Response. Plaintiff objects to this interrogatory on the grounds that it is irrelevant to the issues in this case. Without waiving this objection, plaintiff states that the Commission found reason to believe the Colorado Repub-

lican Federal Campaign Committee and its treasurer violated specified provisions of the Federal Election Campaign Act with respect to the advertisement known as Wirth Facts #1. Subsequently, the Commission made findings of probable cause to believe violations occurred, and later authorized the filing of the present civil action; these Commission actions are described with specificity in the complaint that commenced the present suit. The Commission made no finding of reason to believe that a violation occurred with respect to the other ads referenced in this interrogatory; likewise no finding of probable cause to believe nor any suit authorization was made by the Commission with respect to those other ads. The Commission, like any other agency with law enforcement responsibilities, may exercise such prosecutorial discretion as it or its members deem appropriate.

9. State the factual basis for imposing the constraints of section 441a(d) on a State Party.

Response. Plaintiff objects to this interrogatory on the grounds that the statute in question speaks for itself, as does the legislative history of that statute. Plaintiff further objects to this interrogatory on the grounds that it calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

10. Identify by date, authors, title, and summary, each report generated by the General Counsel's Office to the Federal Election Commission with regard to MUR 2186, excepting those portions of the reports which address conciliation.

Response. August 5, 1986—Charles N. Steele, Lawrence M. Noble, Patty Reilly—First General Counsel's Report—recommended giving Colorado Republican Federal Campaign Committee and its treasurer an additional fifteen days in which to respond to the administrative complaint.

(Each one of the following reports was entitled "General Counsel's Report.")

October 24, 1986—Charles N. Steele, Lawrence M. Noble—recommended that the Commission find reason to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv), on the grounds that respondents made disbursements that were expenditures in connection with the general election for United States Senator from Colorado and that were therefore subject to the limitations of 2 U.S.C. § 441a(d), but were not properly reported as such. The report also recommended that certain questions be asked of the respondents.

May 28, 1987—Lawrence M. Noble—recommends that the Commission find reason to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. § 441a(d)(3)(A), by making expenditures in connection with the general election for United States Senator from Colorado that, coupled with expenditures made by the National Republican Senatorial Committee, authorized by the Colorado Republican Federal Campaign Committee, exceeded the limitations of that statutory section.

December 3, 1987—Lawrence M. Noble, Lois G. Lerner—recommends that respondents be given additional time in which to file a responsive brief.

February 5, 1988—Lawrence M. Noble, Lois G. Lerner—advises the Commission that brief has been received from respondents.

May 20, 1988—Lawrence M. Noble, Patty Reilly—recommends that the Commission find probable cause to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

August 24, 1988—Lawrence M. Noble, Patty Reilly—recommends declining respondents' motion to reconsider the finding of probable cause to believe and recommends finding probable cause to believe that Michael V. Spillane, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

November 18, 1988—Lawrence M. Noble, Patty Reilly—recommends that the Commission find probable cause to believe that Douglas L. Jones, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

March 16, 1989—Lawrence M. Noble, Patty Reilly—recommends that the Commission authorize the Office of the General Counsel to file a civil suit in the United States District Court against the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer.

11. Describe in detail any respect in which Wirth Facts #1 was false or misleading.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, plaintiff states that the Commission made no findings or allegations concerning the truth or falsity of the advertisement.

12. Describe in detail any respect in which Wirth Facts #1 was unfair.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, plaintiff states that the Commission made no findings or allegations concerning the fairness of the advertisement.

13. Explain in detail any appearance of corruption that was presented by the State Party's financing of Wirth Facts #1.

Response. Plaintiff objects to this interrogatory on the grounds that this interrogatory seeks disclosure of the conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving this objection, plaintiff states that the Commission made no findings or allegations concerning the appearance of corruption.

14. Identify with specificity each other group operating that was publicizing the information stated in Wirth Facts #1 in Colorado between February and May, 1986.

Response. Plaintiff objects to this interrogatory on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, plaintiff states that it does not know whether any other group was publicizing the information in question at the time in question.

15. State whether the Commission contends that the "in connection with" standard of section 441a(d) involves an examination of subjective intent and, if so, state all such evidence of the subjective intent of the State party with respect to Wirth Facts #1.

Response. Plaintiff objects to this interrogatory on the grounds that this interrogatory seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

16. Explain how the alleged likelihood that Congressman Wirth would be unopposed was relevant to the determination in April, 1986, of whether expenditures for Wirth Facts #1 would be covered by section 441a(d).

Response. Plaintiff objects to this interrogatory on the grounds that this interrogatory seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving its objection, plaintiff states that the fact that defendants knew by April 1986 that Tim Wirth would be the Democratic party nominee for the United States Senate in the 1986 general election is relevant to the fact that in April 1986 they made expenditures in connection with that general election and in oposition to Mr. Wirth's candidacy.

17. State the latest date in 1985 or 1986 on which the State Party could have financed the broadcast of Wirth Facts #1 without any risk that the Commission would contend that the expenditure fell within section 441a(d), and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this interrogatory on the grounds that is seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff.

18. State whether an expenditure by one state party made for the purpose and with the effect of influencing the nominee for U.S. Senator of another state party is within section 441a(d), and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

19. State whether an expenditure made by a state party for the purpose and with the effect of persuading a candidate of another state party for U.S. Senate to refrain from dishonest campaign tactics is subject to section 441a(d), and explain.

Response. Plaintiff objects to this interrogatory on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this interrogatory on the grounds that it seeks disclosure of the conclusions, opinions, or legal theories of counsel for the plaintiff.

20. State whether the Commission exercises discretion in deciding which charges of the type made in this complaint it will pursue and, if so, explain in detail the standards the Commission applies to guide that discretion.

Response. The Commission may pursue enforcement of matters generated by complaints or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities when it determines, by an affirmative vote of at least four of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of the Federal Election Campaign Act or chapter 95 or chapter 96 of title 26 of the United States Code. Like any other agency with law enforcement responsibilities, the Commission may exercise such prosecutorial discretion as it or its members deem appropriate.

21. Identity by name, address, title, relationship to the Commission, and, expected testimony any witness you expect to call at trial.

Response. Plaintiff objects to this interrogatory on the grounds that it is untimely. Under Local Rule 404, Local Rules D. Colorado, pretrial orders shall follow the "Instructions for Preparation and Submission of Pretrial Order," set forth at Appendix C to the Local Rules, D. Colorado. Under that provision, witnesses are to be identified in the Pretrial Order. Accordingly, it is premature to request this information during this early phase of discovery.

REQUESTS FOR ADMISSION

1. Admit that the Colorado Republican Party ran three radio advertisements and two mailers which were the subject matter of Matter Under Review ("MUR") 2186.

Response. Denied as stated. Admit that the Colorado Republican Party ran three radio advertisements and at least two brochures which were referred to in the administrative complaint that generated MUR 2186.

2. Admit that the Colorado Republican Party never denied running the three radio advertisements and two mailers which were the subject of MUR 2186.

Response. Plaintiff, despite reasonable inquiry, is without sufficient information to admit or deny this Request for Admission. It is admitted, however, that the Colorado Republican Party never denied to the Commission that it ran the advertisements and mailers in question.

3. Admit that the Federal Election Commission did not find reason to believe that two of the three radio advertisements and the two mailers violated any provisions of the Federal Election Campaign Act of 1971, as amended.

Response. Admitted that the Federal Election Commission made no finding with respect to two of the three radio advertisements and the two brochures referred to in the administrative complaint. To the extent that this Request for Admission may be understood as requesting an admission that the Commission made any finding with respect to the two advertisements and the two brochures in question, it is denied.

4. Admit the Federal Election Commission distinguished "Wirth Facts #1" from the advertisements which were the subject of MUR 2186 based solely on the content of "Wirth Facts #1."

Response. Denied. The Federal Election Commission made no finding distinguishing Wirth Facts #1 from any other advertisements.

5. Admit that the only basis for distinction between "Wirth Facts #1" and the other advertisements which were the subject of the MUR was the content of "Wirth Facts# 1."

Response. Denied. The Federal Election Commission made no finding distinguishing Wirth Facts #1 from any other advertisements.

6. Admit that Tim Wirth was an incumbent Congressman in 1986.

Response. Admitted.

7. Admit there is a compelling public interest in assuring that constituents are fully informed of any attempts by an incumbent Federal Congressman to deceive them.

Response. Plaintiff objects to this Request for Admission on the grounds that it is blatantly hypothetical and therefore seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects to this Request for Admission on the grounds that it seeks disclosure of

the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff.

8. Admit that an important role of any state party is to act as a watch dog over that State's incumbent Federal Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it is hypothetical, irrelevant, vague, confusing, and vexatious.

9. Admit that, for the past two decades, more than 90% of incumbent Federal Congressmen have won reelection when they chose to run for reelection.

Response. Plaintiff objects to this Request for Admission on the grounds that it seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff further objects on the grounds that the Request for Admission is improper, in that defendants seek to require plaintiff to undertake research and analysis respecting the results of elections for Congress over a twenty year period; the purpose of a Request for Admission, however, is not to require investigation into novel areas of inquiry, but to narrow the issues already in dispute.

10. Admit that the State Party reported the costs for "Wirth Facts #1" as an operating expenditure on the Colorado Republican Federal Campaign Committee's 1986 July 15 Quarterly Report at Schedule B, page 1 of 1 for line 19, item A.

Response. Admitted; but deny that such reporting satisfied the requirements of the Federal Election Campaign Act.

11. Admit that the primary for the Democratic nomination for United States Senator from the State of Colorado in 1986 was not held until August 12, 1986.

Response. Admitted.

12. Admit that "Wirth Facts #1" was aired only between April 4, 1986 and April 13, 1986.

Response. Admitted that defendants have, in response to discovery requests by plaintiff, provided documentation showing that Wirth Facts #1 was aired between April 4, 1986, and April 13, 1986. Plaintiff is without knowledge of any other occasions on which Wirth Facts #1 may have been aired.

13. Admit that "Wirth Facts #1" was aired four months prior to the 1986 primary election for United States Senator in Colorado.

Response. Admit that defendants have, in response to discovery requests by plaintiff, provided documentation showing that Wirth Facts #1 was aired between April 4, 1986, and April 13, 1986. Plaintiff is without knowledge of any other occasions on which Wirth Facts #1 may have been aired. Admitted that the ads aired between April 4, 1986, and April 13, 1986, were aired approximately four months prior to the 1986 primary election for United States Senator in Colorado.

14. Admit that one effect of the Federal Election Campaign Act of 1971, as interpreted by the Commission in this case, is to protect incumbents from organized and financed criticism by the State Party.

Response. Denied.

15. Admit that, during April, 1986, no one could be certain who would be the Democratic candidate for United States Senator from Colorado.

Response. Denied.

16. Admit that predicting the outcome of primary elections more than four months in advance is difficult at best.

Response. Plaintiff objects to this Request for Admission on grounds of vagueness, and on grounds that it is

hypothetical and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

17. Admit that, as of April, 1986, the State Party could not be sure who would be the Democratic nominee in the general election for U.S. Senator from Colorado.

Response. Denied.

18. Admit that, prior to the adoption of the Act, State parties were permitted to make unlimited expenditures criticizing incumbents.

Response. Plaintiff objects to this Request for Admission on the grounds that it is vague, confusing, vexatious, unduly burdensome, and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

19. Admit that, prior to the adoption of the Act, state parties regularly made expenditures criticizing the conduct of incumbent Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it is vague, confusing, vexatious, unduly burdensome and irksome and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

20. Admit that one effect of the Act is to reduce spending by State Parties to criticize incumbent Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it is hypothetical, speculative, vague, confusing, vexatious, unduly burdensome, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not

reasonably calculated to lead to the discovery of admissible evidence.

21. Admit that there is no corruption or appearance of corruption when a State Party spends money to criticize the conduct of an incumbent Congressman.

Response. Plaintiff objects to this Request for Admission on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff. Further, plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Also, plaintiff objects on the grounds that this Request for Admission seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the aforesaid objections, plaintiff states that a judgment concerning the issue raised by this Request for Admission must take into account specific factual circumstances.

22. Admit that public policy favors open and robust criticism of incumbent Congressmen.

Response. Plaintiff objects to this Request for Admission on the grounds that it seeks disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel for the plaintiff. Further, plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Also, plaintiff objects on the grounds that this Request for Admission seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the afore-

said objections, plaintiff states that a judgment concerning the issue raised by this Request for Admission must take into account specific factual circumstances.

23. Admit that the Act would not restrict expenditures for the dissemination of Wirth Facts #1 made by a bona fide, independent trade union.

Response. Plaintiff objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

24. Admit that the Act would not restrict expenditure for the dissemination of Wirth Facts #1 made by a bona fide, independent political study group.

Response. Plaintiff objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

25. Admit that the Colorado State Democratic Party understood section 441a(d) to apply to all of the advertisements identified in its complaint.

Response. Plaintiff objects to this Request for Admission on the grounds that it asks plaintiff to make an admission as to what another party understood.

26. Admit that one or more members of the Commission voted against finding reason to believe that the violations charged in the present complaint had occurred.

Response. Admitted.

27. Admit that honest political advocacy is protected by the First Amendment.

Response. Plaintiff objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment.

28. Admit that the violations charged in the present complaint are *malum prohibitum* and not *malum in se*.

Response. Plaintiff objects on the grounds that the terms cited in the Request for Admission are commonly used for purposes of analysis of offenses in the field of criminal law; since the present case is civil, and not criminal, the terms cited have no relevance here. Without waiving its objection, plaintiff states that it has never alleged that the violations at issue in this action should be characterized as "*malum in se*."

29. Admit that the residents of Colorado have a compelling interest in assuring the honesty of the U.S. Congressman from Colorado.

Response. Plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Plaintiff also objects on the grounds that the Request for Admission is hypothetical, speculative, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

30. Admit that the expenditure of funds by a State Party to criticize the official conduct of a member of Congress from that state does not, in itself, give rise to any appearance of impropriety.

Response. Plaintiff objects on the grounds that the Request for Admission is vexatious and unduly burdensome, and calls for presentation and briefing of arguments which are properly presented in a brief in support of or in opposition to a Motion for Summary Judgment. Without waiving the aforesaid objections, plaintiff states that a judgment concerning the issue raised by this Request for Admission must take into account specific factual circumstances.

31. Admit that, but for the restrictions imposed by the Act that are at issue in this case, the State Party would have spent additional funds in connection with the 1986 general election for U.S. Senator from Colorado.

Response. Plaintiff objects to this Request for Admission on the grounds that it requests plaintiff to make an admission concerning what another party might have done in the past given a hypothetical set of circumstances. Obviously, plaintiff is without the knowledge necessary to form an opinion concerning such a matter.

32. Admit that, but for the restrictions imposed by the Act that are at issue in this case, the State Party would seek to raise and spend funds in excess of the amounts allowed by the Act in connection with general elections for U.S. Senator from Colorado.

Response. Plaintiff objects to this Request for Admission on the grounds that it requests plaintiff to make an admission concerning what another party might do in the future given a hypothetical set of circumstances. Obviously, plaintiff is without the knowledge necessary to form an opinion concerning such a matter.

33. Admit that state parties within a given state often vary in their ability to raise funds for expenditure in connection with general elections to the U.S. Congress.

Response. Plaintiff objects to this Request for Admission on the grounds that it is hypothetical, speculative, vague, confusing, unclear, vexatious, unduly burdensome, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

34. Admit that the state parties in Colorado differ in their ability to raise funds for expenditure in connection with general elections to the U.S. Congress.

Response. Plaintiff objects on the grounds that this Request for Admission is speculative, vague, confusing, unclear, vexatious, unduly burdensome, and irksome, and seeks discovery of matters not relevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection, plaintiff states that it is without sufficient information to make such an assessment.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Ivan Rivera
IVAN RIVERA
Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
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January 2, 1990

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

DEFENDANTS' RESPONSES TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS

The defendants hereby respond to the plaintiff's second set of discovery requests. In an effort to avoid needless controversy, defendants, occasionally have provided information in response to an objectionable request or interrogatory. This voluntary information is without prejudice to any objection.

ADMISSIONS

Request for Admission No. 1

Admit that David Grace's name did not appear on the ballot as a candidate for the Democratic Party's nomination for United States Senator from Colorado in the primary held on August 12, 1986.

Response to Request for Admission No. 1

Registered Republicans in the state of Colorado were given only a Republican Party Ballot in the August 12, 1986 primary election held for the Republican Party's nomination for United States Senator from Colorado. Further, the State Party is not in possession of a Democratic Party Ballot for the August 12, 1986 Democratic primary election. Therefore, the State Party is without knowledge and information sufficient to form a belief as to the truth of this statement.

Request for Admission No. 2

Admit that David Grace did not file with the Commission a written designation of a political committee to

serve as his principal campaign committee in connection with the 1986 election for United States Senator from Colorado.

Response to Request for Admission No. 2

The State Party is without knowledge and information sufficient to form a belief as to the truth of this statement. Upon information and belief, this information is in the actual possession of the FEC.

Request for Admission No. 3

Admit that no political committee purporting to be the principal campaign committee of David Grace in connection with the 1986 election for United States Senator from Colorado registered with or reported to the Commission.

Response to Request for Admission No. 3

The State Party is without knowledge and information sufficient to form a belief as to the truth of this statement. Upon information and belief, this information is in the actual possession of the FEC.

Request for Admission No. 4

Admit that Tim Wirth was the only candidate whose name appeared on the ballot in the primary election held August 12, 1986, for the Democratic Party's nomination for United States Senator from Colorado.

Response to Request for Admission No. 4

Registered Republicans in the state of Colorado were given only a Republican Party Ballot in the August 12, 1986 primary election held for the Republican Party's nomination for United States Senator from Colorado. Further, the State Party is not in possession of a Democratic Party Ballot for the August 12, 1986 Democratic

primary election. Therefore, the State Party is without knowledge and information sufficient to form a belief as to the truth of this statement.

Request for Admission No. 5

Admit that the Colorado Republican Federal Campaign Committee represents itself as, and is, a State committee of the Republican Party. (*See* Exhibit A.)

Response to Request for Admission No. 5

Admitted that the State Party is a State Committee of the Republican Party. *See also* Response to Request for Admission No. 12 of the plaintiff's first set of discovery requests.

Request for Admission No. 6

Admit that the purposes for which the Colorado Republican Federal Campaign Committee exists is to help elect Republican candidates for political office in the State of Colorado.

Response to Request for Admission No. 6

Admitted that the Colorado Republican Federal Campaign Committee exists for several constitutionally protected purposes, including the following: to ensure that incumbent Congressmen from the state of Colorado are held accountable to their constituents; to freely engage in political speech and association protected by the First Amendment to the United States Constitution; to promote the public good by advocating sound principles of, and high standards for, public governance; and to help elect Republican candidates for political office in the State of Colorado.

Request for Admission No. 7

Admit that you authorized the National Republican Senatorial Committee to serve as your agent for the pur-

pose of making expenditures allowed under 12 U.S.C. § 441a(d)(3) in connection with the 1986 general election campaign for United States Senator from Colorado in order that such expenditures would help elect whoever was the Republican candidate in that election.

Response to Request for Admission No. 7

As stated in paragraph 36 of the State Party's Answer in this case,

> Defendants admit that the Colorado Republic Party authorized the National Republican Senatorial Committee to serve as its agent for the purpose of making expenditures under 2 U.S.C. § 441a(d)(3) but deny all further allegations.

Request for Admission No. 8

Admit that you authorized the National Republican Senatorial Committee to serve as your agent for the purpose of making expenditures allowed under 2 U.S.C. § 441a(d)(3) in connection with the 1986 general election campaign for U.S. Senator from Colorado on March 14, 1986. (*See* Exhibit B.)

Response to Request for Admission No. 8

Admitted that Exhibit B attached to Plaintiff's Second Set of Discovery Requests is a true and accurate copy of an authentic document that speaks for itself.

INTERROGATORIES

Interrogatory No. 1

For each Request for Admission which you have not admitted, specify the grounds and facts which you contend support your refusal to admit the truth of the matter asserted therein, identify all persons having knowledge of such facts, and identify all records relating to or reflecting such grounds and facts.

Response to Interrogatory No. 1

Virtually all of the denials were based on a lack of information, thus making compliance with this request impossible. The grounds and facts which the State Party contends supports its denials in this matter have been specified in the State Party's Answer and Counterclaim in this matter and in the foregoing responses. Defendants object that the requirement that it identify "all" persons having knowledge of such facts, and that it identify "all" records relating to or reflecting such grounds and facts is overbroad and unduly burdensome, but state that persons with knowledge of the facts of this matter include the Commission, the Commission Staff, Senator Wirth and his staff, M. Buie Seawell, David Grace, and residents of Colorado in 1986, and that relevant documents include those referred to in the foregoing responses to plaintiff's request for admission.

Interrogatory No. 2

In your response to Request for Admission No. 6 of the Plaintiff's First Set of Discovery Requests, with respect to the brief signed by the Commission's General Counsel on September 28, 1988, and sent to Douglas L. Jones, treasurer of the Colorado Republican Federal Campaign Committee, you "denied that such brief stated the position of the General Counsel or [sic] the legal and factual issues of the case." State with specificity the grounds and facts which you contend support the aforesaid denial, identify all persons having knowledge of such facts, and identify all records relating to or reflecting such grounds and facts.

Response to Interrogatory No. 2

Defendants were requested to admit that

> the Commission's General Counsel notified Douglas L. Jones by letter dated September 28, 1988, (*See* Exhibit 7) that the General Counsel was prepared

> to recommend that the Commission find probable cause to believe that Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, had violated the Act, and provided him with a brief stating the position of the General Counsel in [sic] the legal and factual issues of the case. (*See* Exhibit 8.)

Defendants appropriately

> [a]dmitted that Exhibit 8 is a true and accurate copy of an authentic document that speaks for itself and that Mr. Jones was provided with a General Counsel's Supplemental Brief which speaks for itself, but denied that such brief stated the position of the General Counsel or the legal and factual issues of the case.

The denial that, "such brief stated the position of the General Counsel or the legal at factual issues of the case" reflected the very limited scope of the document, which did not address most issues in the case. Defendants object that the requirement that it identify "all" persons having knowledge of such facts, and that it identify "all" records relating to or reflecting such grounds and facts is overbroad and unduly burdensome, but state that persons with knowledge of the facts of this matter include the Commission and the Commission Staff, and that relevant documents include those referred to in the foregoing responses to plaintiff's request for admission.

Interrogatory No. 3

Identify the persons who established the Colorado Republican Federal Campaign Committee and state specifically when they did so.

Response to Interrogatory No. 3

The Colorado Republican Federal Campaign Committee was established by the Colorado Republican Party

after the institution of the Federal Election Commission. The Colorado Republican Federal Campaign Committee filed its initial Statement of Organization with the Federal Election Commission in February, 1976. As indicated by that document, on file with the Federal Election Commission, the original chairman of the Committee was William Willoughby, and its initial Treasurer was Jim Manuel.

Interrogatory No. 4

State the purposes for which the Colorado Republican Federal Campaign Committee was established, and identify all documents and records that evidence, set forth, or describe those purposes.

Response to Interrogatory No. 4

The State Party has been unable to locate its Bylaws dating to 1976. However the Bylaws of the Colorado Republican State Central Committee adopted April 13, 1978, to be effective June 1, 1978 state the purpose as follows:

> The purpose of this organization shall be to perform the functions set forth in the election laws of the State of Colorado and to exert every effort to achieve the objectives of the Republican Party as reflected in the Republican State Platform and in the rules and platform adopted by the Republican National convention.

Interrogatory No. 5

State whether the Colorado Republican Federal Campaign Committee is incorporated. If so, identify the state and date of incorporation. Identify all documents relating to your corporate status, including, but not limited to, articles of incorporation and registration forms filed with any governmental agency.

Response to Interrogatory No. 5

The Colorado Republican Federal Campaign Committee is not incorporated.

Interrogatory No. 6

Identify the person who made the decision, or who participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1."

Response to Interrogatory No. 6

Objection, the specific identity is irrelevant since the role of the State Party is not in dispute. Without waiving this objection, no individual currently employed by the Colorado Republican Party made the decision, or participated in the decision to produce "Wirth Facts #1." Thus, the Colorado Republican Federal Campaign Committee is without knowledge and information sufficient to attest to the information requested.

Interrogatory No. 7

State the purposes for which "Wirth Facts #1" was produced and aired. Identify all records and documents, including, but not limited to, internal memoranda, letters, and minutes of meetings, that evidence, set forth, or describe those purposes.

Response to Interrogatory No. 7

Defendants object that the subjective intent of its representatives with respect to Wirth Facts #1 is irrelevant, as demonstrated by the Commission's failure to inquire into such subject or matters before initiating this case. Without waving that objection, no individual currently employed by the Colorado Republican Party participated in the decision to produce "Wirth Facts #1" and thus cannot attest to the subjective purposes for which "Wirth Facts #1" was produced and aired. Viewed objectively, Wirth Facts #1 served to inform the residents of Colorado of the conduct of an incumbent Congressman and to call for honesty in public affairs.

Defendants object that the requirement that it identify "all" records and documents, including but not limited to, internal memoranda, letters, and minutes of meetings, that evidence, set forth, or describe the subjective purposes behind "Wirth Facts #1" is irrelevant, unduly burdensome and overbroad. Without waiving that objection, defendants are not aware of any such documents. The objective purposes are evident from Wirth Facts #1 itself.

Interrogatory No. 8

Identify the person or persons who appoint the treasurer of the Colorado Republican Federal Campaign Committee.

Response to Interrogatory No. 8

The treasurer of the Colorado Republican Federal Campaign Committee is appointed by the Chairman of the Colorado Republican Party.

Interrogatory No. 9

Identify the person or persons who appoint the chairman of the Colorado Republican Federal Campaign Committee.

Response to Interrogatory No. 9

The structure of the Colorado Republican Party is statutorily provided for by the State of Colorado. *See* Colorado Rev. Stat. § 1-3-103 (1988). The Chairman of the Colorado Republican Party is the Chairman of the Colorado Republican Federal Campaign Committee.

Interrogatory No. 10

State whether the Colorado Republican Federal Campaign Committee has ever supported, endorsed, or made

contributions to any candidate in any general election for federal office who was not a Republican.

Response to Interrogatory No. 10

Objection, irrelevant. Without waiving that objection, the disclosure reports on file with the Federal Election Commission will indicate whether the Colorado Republican Federal Campaign Committee has made contributions to any candidate in any general election for federal office who was not a Republican. They are in the actual possession of the Commission. The current employees of the Colorado State Party are unable to attest with certainty whether the Colorado Republican Federal Campaign Committee has *ever* supported or endorsed any candidate in any general election for federal office who is not a Republican. As a general proposition, the Colorado Republican Party supports Republican policies and candidates.

Interrogatory No. 11

If the answer to the preceding interrogatory was affirmative, identify all such candidates and state with particularity the nature of the support, endorsement, or contributions such candidates received from the Colorado Republican Federal Campaign Committee.

Response to Interrogatory No. 11

See Response to Interrogatory No. 10 above.

Interrogatory No. 12

Identify all persons who decided, or participated in the process of deciding, which candidates for federal office the Republican Federal Campaign Committee would support in 1986.

Response to Interrogatory No. 12

Objection, irrelevant. Without waiving that objection, the present employees of the Colorado Republican Party cannot attest with certainty who decided or participated in the process of deciding which candidates for federal office the Colorado Republican Federal Campaign Committee would support in 1986.

I declare under penalty of perjury that the foregoing interrogatories and answers are true and accurate to be best of my information, knowledge, and belief.

/s/ John S. Dorrenbacher
JOHN S. DORRENBACHER

OBJECTIONS AND CONTRIBUTIONS ARE BY COUNSEL:

/s/ Jan W. Baran
JAN W. BARAN
THOMAS W. KIRBY
CAROL A. LAHAM
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as Treasurer

[Certificate of Service Omitted in Printing]

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and VINCENT A. ZARLENGO, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of November 5, 1986, do hereby certify that the Commission took the following actions in MUR 2186:

1. *Decided by a vote of 5-1* to find reason to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) for failure to allocate for the cost of the "Defense" radio ad.

   Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

2. *Failed in a vote of 3-3* to pass a motion to find reason to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with all of the other ads indentified in the complaint.

   Commissioners McDonald, McGarry, and Thomas voted affirmatively for the motion; Commissioners Aikens, Elliott, and Josefiak dissented.

3. *Decided by a vote of 6-0* to direct the Office of General Counsel to send the letter attached to the General Counsel's report and include appropriate questions.

Commissioners Aikens, Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision.

Attest:

Date 11-6-86

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

THE COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and VINCENT ZARLENGO, as treasurer

CERTIFICATION

I, Mary W. Dove, recording secretary for the Federal Election Commission executive session on June 9, 1987, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in the above-captioned matter:

1. Find reason to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. § 441a(d)(3)(A).
2. Approve the letter attached to the General Counsel's report dated May 28, 1987.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision. Commissioner Aikens dissented.

Attest:

6-10-87
Date

/s/ Mary W. Dove
MARY W. DOVE
Administrative Assistant

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO FEDERAL CAMPAIGN COMMITTEE and VINCENT ZARLENGO, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of June 14, 1988, do hereby certify that the Commission took the following actions in MUR 2186:

1.
2. *Decided by a vote of 5-1* to
   a) Find probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f).
   b) Direct the General Counsel to send the appropriate letter and conciliation agreement pursuant to the above actions.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decisions; Commissioner Aikens dissented.

Attest:

6-15-88
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of September 13, 1988, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in MUR 2186:

1. Decline to grant the motion for reconsideration filed by Colorado Republican Federal Campaign Committee and Mr. Jones, as treasurer.
2. Direct the Office of General Counsel to send an appropriate letter pursuant to the above action.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

9-13-88
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of January 10, 1989, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in MUR 2186:

1. Find probable cause to believe Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, violated 2 U.S.C. §§ 434 (b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a (f).
2. Approve the letter and concilation agreement attached to the General Counsel's report dated November 18, 1988.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

Jan. 12, 1989
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2186

IN THE MATTER OF

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as treasurer

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of April 7, 1989, do hereby certify that the Commission decided by a vote of 5-1 to take the following actions in MUR 2186:

1.

2. Authorize the Office of the General Counsel to file a civil suit in the United States District Court against the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer.

3. Approve the letter attached to the General Counsel's report dated March 16, 1989.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

4-7-89
Date

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION,
Plaintiff,

vs.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFF'S SECOND SET OF DISCOVERY REQUESTS, INTERROGATORY NOS. 6 AND 7

The defendants hereby submit these supplemental responses to the plaintiff's second set of discovery requests, interrogatory nos. 6 and 7.

INTERROGATORIES

Interrogatory No. 6

Identify the person who made the decision, or who participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1."

Response to Interrogatory No. 6

Upon information and belief, several persons participated in making the decision to produce and air the radio advertisement known as "Wirth Facts #1." A person who was directly and personally involved, and who made the final decision was Howard "Bo" Callaway, former Chairman of the Colorado Republican Party. As Chairman of the Colorado Republican Party, Bo Callaway

was the individual ultimately responsible for the decision to produce and air the advertisement.

Interrogatory No. 7

State the purposes for which "Wirth Facts #1" was produced and aired. Identify all records and documents, including, but not limited to, internal memoranda, letters, and minutes of mettings, that evidence, set forth, or describe those purposes.

Response to Interrogatory No. 7

Defendants have previously stated the objective purpose of Wirth Facts #1. Mr. Callaway, who no longer has any position with the Committee, is believed knowledgeable concerning the subjective intent of himself and, perhaps, others.

Further, a search of the existing records and documents of the Colorado Republican Party has been made and the following documents responsive to this request have been located: Press Conference Statement of Bo Callaway, and Statement of Bo Callaway dated April 4, 1986.

I declare under penalty of perjury that the foregoing interrogatories and answers are true and accurate to be best of my information, knowledge, and belief.

/s/ John Dorrenbacher
JOHN DORRENBACHER

April 16, 1990

[Colorado Party Logo]

COLORADO REPUBLICANS
1275 Tremont Place, Denver, Colorado 80204
(303) 893-1776

Howard H. Callaway
State Chairman

PRESS CONFERENCE STATEMENT
OF BO CALLAWAY

Based on recent political stories, I had not thought that I would be outraged by Tim Wirth's first political ads until at least June or July. However, his blatant attempt to reconstruct 11 years worth of a down-the-line liberal voting record has come early, and I feel compelled to respond.

I will limit my comments to his second ad, which quotes him regarding defense and economic issues. I will note, however, that anyone who is *at all* familiar with walking in snowshoes can see that his efforts in the first ad are extremely clumsy, and are not those of someone who regularly takes his family for hikes in the woods.

In the second ad Wirth states, "We need a strong defense. It's expensive, and we have to pay for it."

Based on that statement alone, the ad has become an instant entry in the 1986 Campaign Advertising Hall of Shame.

For 11 years, Tim Wirth has been one of the most ardent foes of revived American military capability. Forget the rhetoric in his ads. Look at what he has voted AGAINST:

—the B-1 bomber nine times,
—AWACS twice,
—the maneuverable re-entry vehicle (MaRV) twice,
—chemical weapons seven times,
—the F-18 twice,

—nuclear-powered aircraft carriers seven times,
—the Lance missile once,
—the neutron bomb three times,
—the MX missile at least seventeen times,
—the C-5 cargo plane once,
—anti-satellite weapons (ASATs) twice, and
—the M-2 fighting vehicle once.

Combine those votes with the following:

—his 1983 statement in the Rocky Mountain News that, "It's absolutely criminal the amount of money this country is spending on defense."
—his cosponsorship of a bill that would allow conscientious objectors to avoid having their taxes used by the Defense Department and other military related agencies.
—his vote to protect federal aid for students who refused to register with the Selective Service System.
—his 1984 anti-defense rhetoric featuring the fraudulent example of the Allen Wrench.
—his support for the 1984 Black Caucus budget proposal, which would have reduced defense spending by $203 billion.
—his poor ratings from defense and national security organizations such as the American Security Council, which gives Wirth a career rating of 9%, with Wirth actually getting a Zero in 1984.

As a West Point graduate, former congressman, and former Secretary of the Army, I can categorically tell you that Tim Wirth's record on defense issues is abysmal. It's too bad that he has only discovered the need for a strong national defense now that he's running for the Senate. His anti-defense attitude can be clearly documented over eleven years, and no amount of slick commercials or Hollywood hype can change that fact.

That's the first point. The second regards his statement that, "Cutting the federal budget is our highest priority and greates challenge."

Again, the conservative rhetoric simply doesn't match the record. Consider these actions:

—voting against a Balanced Budget Amendment to the Constitution, and calling it a "flim-flam" and "extremely dangerous."
—voting against line-item veto authority for the President when 43 governors are allowed to use that tool as a means to reduce spending.
—Chairing a Democratic Task Force that called for a massive 5-year Public Works Program (Denver Post's description, not mine) in 1982.
—voting against the U.S. Chamber of Commerce 60% of the time in 1983 and 1984, and against the National Association of Businessmen (self-styled Watchdogs of the Treasury) 100% of the time in 1983, which represents a fiscal conservative score of Zero.
—voting for the Black Caucus budget proposal in 1984, which would have reduced the deficit by increasing taxes a whopping $181 billion over a three-year period.

If Tim Wirth wants to vote the liberal line in Congress, that's fine. I will strongly disagree with his philosophy, but I will respect him for voting his conscience.

However, if his record is anti-defense and pro-spending, which it *clearly* is, he ought to acknowledge his liberal stripes and defend his record for what it is; liberal.

You can't have it both ways, Tim.

In Colorado, a man is only as good as his word. After viewing these ads, Coloradans should ask, "What are Tim Wirth's words worth?" With blatant disregard for the facts, he has purchased television time to baldly misstate his record on two key issues: defense and federal spending.

This press conference is to serve notice that Tim Wirth will not get away with it. His record will be scrutinized

as it has never been, and we in the Republican party are committed to letting the public know what Tim Wirth's record *really is.* Only then will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator.

[Colorado Party Logo]

COLORADO REPUBLICANS
1275 Tremont Place, Denver, Colorado 80204
(303) 893-1776

Howard H. Callaway
State Chairman

[April 4]

STATEMENT OF BO CALLAWAY

Two weeks ago I held a press conference and called Tim Wirth's first wave of advertising "a blatant attempt to reconstruct 11 years worth of a down-the-line liberal voting record."

I had hoped that the press conference would represent, in some small way, our attempt to set the record straight. But now that Tim Wirth has apparently decided to extend his TV buy, we in the Colorado Republican party feel that stronger measures are needed to combat this initial wave of shameless deceit and outright distortion. For that reason, we have decided to purchase radio time and state the unpleasant facts about Tim Wirth's record.

This is an investment in principle. There is no way we can match Tim Wirth's expenditures dollar-for-dollar. As long as he continues to extort outrageous sums from PACs, and special interests that his committee directly regulates, he will have a substantial money advantage in this race.

Nonetheless, we will oppose his attempts to run on a platform of thinly-veiled Republicanism with all the effort we can muster. His record on defense issues is clear. He has opposed every major weapons system during the past five years, and has regularly voted to make massive, irresponsible cuts in the defense budget.

His record on economic issues is equally as clear. His feeble attempt to portray himself as a fiscal conservative

is completely contradicted by his 11-year voting record, which includes votes against a Balanced Budget Amendment, against a line-item veto for the President, and regular support for tax increases.

It is bad enough for Colorado that Tim Wirth was an extremely liberal congressman for 12 years. It's even worse that he has deliberately chosen to mislead the voters by building a false image of himself.

As the elected spokesman for 535,000 registered Republicans in Colorado, I have an obligation to defend Republican philosophy from the campaign equivalent of cowbirds; politicians that try to take over our issues for temporary convenience, and then abandon them for liberal causes once the election is hatched.

As the radio ad states, Tim Wirth has a right to run for the US Senate. He does *not* have the right, however, to change the facts regarding his voting record based on what a media consultant tells him is necessary to win. Our ad represents an honest effort to set the facts straight. The voters in Colorado deserve no less.

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption Omitted in Printing]

PLAINTIFF FEDERAL ELECTION COMMISSION'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' FIRST SET OF DISCOVERY REQUESTS

The plaintiff Federal Election Commission (the "Commission" or "FEC"), through its undersigned counsel, supplements its responses to defendants' first set of discovery requests in this litigation as follows:

INTERROGATORIES

1. Specify the Commission's basis for distinguishing between the advertisements known as Wirth Facts #1 and each of the other advertisements which were the subject of the complaint filed by M. Buie Seawell and designated Matter Under Review 2186.

Response. The administrative complaint filed by M. Buie Seawell and defendants' response thereto cited Wirth Facts #1 and two other radio advertisements paid for by defendants. With respect to Wirth Facts #1 (also known as the "Defense" radio ad), on November 5, 1986 the Commission decided by a vote of five to one to find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) for failure to allocate for the cost of the "Defense" radio ad. A motion was made at the same November 5, 1986 Commission meeting to also find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with the other ads identified in the administrative complaint. That motion, however, failed to pass by a vote of three to three, and no other motions

were made with respect to finding reason to believe the other two advertisements violated the Act. The three to three deadlock vote by the Commission is not an agency action within the meaning of 2 U.S.C. § 437g. Accordingly, the Commission made no findings with respect to the latter advertisements at all.

The only difference between the Commission's votes on Wirth Facts #1 and the other ads was that two of the five FEC Commissioners who voted to find reason to believe that defendants violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with Wirth Facts #1 later voted to find no reason to believe with respect to the other two advertisements. The remaining Commissioners voted the same (either reason to believe or no reason to believe) with respect to all the advertisements. No Statements of Reasons were issued by any of the Commissioners explaining any of their votes in the administrative enforcement matter, nor were such statements required. *Common Cause v. FEC*, 842 F.2d 436, 450-451 (D.C.Cir. 1988). In the absence of a strong showing of bad faith or improper behavior, inquiry into the mental processes of administrative decisionmakers is completely improper. Defendants have not even attempted to make such a showing here. In any event, none of the Commission's findings or votes in the administrative enforcement proceeding is subject to judicial review in this *de novo* litigation. *FEC v. National Conservative Political Action Committee*, Civil Action No. 85-2898 (D.D.C. April 29, 1987) (copy attached as FEC Exhibit 1).

Four FEC Commissioners found no distinction between Wirth Facts #1 and the two other radio advertisements; three found reason to believe with respect to all three advertisements and one found no reason to believe with respect those advertisements. Without waiving any of the foregoing objections, counsel for the Commission notes that although the remaining two Commissioners issued no statements of reasons for their different votes, it appears

that they voted against finding reason to believe with respect to the other advertisements primarily because they believed those advertisements contained no electioneering message.

2. Specify each compelling government interest asserted by the Commission in support of the constitutionality of 2 U.S.C. § 441a(d).

Response. The compelling governmental interest in preventing actual or apparent corruption of the political process supports the constitutionality of 2 U.S.C. § 441a(d).

5. State whether omission of the phrase "has a right to run for the Senate, but he" from Wirth Facts #1, with all other facts remaining the same, would have avoided the alleged violation of the Act.

Response. This question calls for the counsel for the Commission to speculate as to what the Commission might have done under different facts than were presented in this case. Without conceding that interrogatories seeking conclusions of law unrelated to the facts of the case are appropriate under the Federal Rules of Civil Procedure, the Commission notes that the Federal Election Campaign Act sets forth a procedure whereby any person may obtain an advisory opinion from the Commission concerning the application of the Act to any specific transaction or activity proposed by the requester. 2 U.S.C. § 437f(a). That provision specifies, however, that "[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section." 2 U.S.C. § 437f(b).

Since defendants have neither proposed undertaking the activity discussed in this interrogatory nor requested an advisory opinion pursuant to 2 U.S.C. § 437f, counsel for the Commission can only respond to the interrogatory by noting that the standard for determining whether an ex-

penditure comes within the limitations of 2 U.S.C. § 441a (d)(3) is whether it constitutes an expenditure in connection with the general election campaign of a candidate for Federal office. If the advertisement discussed in the interrogatory had been the subject of an administrative complaint, the Commission would have addressed the question whether the expenditure that financed this hypothetical ad was made in connection with the general election campaign of a candidate for federal office, just as it addressed that question with respect to the ads at issue in the administrative complaint. Since the Commission was not presented with that question, a more definitive answer to this interrogatory is not possible. However, as noted in the Commission's response to Interrogatory 1, the absence of the quoted language might well have led to a different vote by some Commissioners.

8. Distinguish the status of Wirth Facts #1 under Section 441a(d) from the status of the other ads identified in the administrative complaint, explaining in detail why one and not the others led to the present charges.

Response. The administrative complaint filed by M. Buie Seawell and defendants' response thereto cited Wirth Facts #1 and two other radio advertisements paid for by defendants. With respect to Wirth Facts #1 (also known as the "Defense" radio ad), on November 5, 1986 the Commission decided by a vote of five to one to find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) for failure to allocate for the cost of the "Defense" radio ad. A motion was made at the same November 5, 1986 Commission meeting to also find reason to believe that the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with the other ads identified in the administrative complaint. That motion, however, failed to pass by a vote of three to three, and

no other motions were made with respect to finding reason to believe the other two advertisements violated the Act. The three to three deadlock vote by the Commission is not an agency action within the meaning of 2 U.S.C. § 437g. Accordingly, the Commission made no findings with respect to the later advertisements at all.

The only difference between the Commission's votes on Wirth Facts #1 and the other ads was that two of the five FEC Commissioners who voted to find reason to believe that defendants violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with Wirth Facts #1 later voted to find no reason to believe with respect to the other two advertisements. The remaining Commissioners voted the same (either reason to believe or no reason to believe) with respect to all the advertisements. No Statements of Reasons were issued by any of the Commissioners explaining any of their votes in the administrative enforcement matter, nor were such statements required. *Common Cause v. FEC*, 842 F.2d 436, 450-451 (D.C.Cir. 1988). In the absence of a strong showing of bad faith or improper behavior, inquiry into the mental processes of administrative decisionmakers is completely improper. Defendants have not even atempted to make such a showing here. In any event, none of the Commission's findings or votes in the administrative enforcement proceeding is subject to judicial review in this *de novo* litigation. *FEC v. National Conservative Political Action Committee*, Civil Action No. 85-2898 (D.D.C. April 29, 1987) (copy attached as FEC Exhibit 1).

Four FEC Commissioners found no distinction between Wirth Facts #1 and the two other radio advertisements; three found reason to believe with respect to all three advertisements and one found no reason to believe with respect those advertisements. Without waiving any of the foregoing objections, counsel for the Commission notes that although the remaining two Commissioners issued no statements of reasons for their different votes, it ap-

pears that they voted against finding reason to believe with respect to the other advertisements primarily because they believed those advertisements contained no electioneering message.

15. State whether the Commission contends that the "in connection with" standard of section 441a(d) involves an examination of subjective intent and, if so, state all such evidence of the subjective intent of the State party with respect to Wirth Facts #1.

Response. A *prima facie* showing of a violation of 2 U.S.C. § 441a(d)(3) does not require proof of the subjective intent of the persons alleged to have violated that provision by making an expenditure in excess of the statutory limit. Subjective intent, however, may be relevant to determining whether a violation of 2 U.S.C. § 441a(d) occurred.

In the present case, discovery has not yet been completed. Evidence relevant to the question of defendants' subjective intent uncovered to date consists of the following: defendants' use of funds from their federal account to pay for the ads; the fact that defendants' ad was, by its own terms, a response to an ad advocating the election of Tim Wirth to the United States Senate; the fact that Wirth Facts #1 contained an explicit reference to Wirth's candidacy for the U.S. Senate; and the fact that the defendant committee is a party organization that exists for the purpose of electing that party's candidates to political office.

17. State the latest date in 1985 or 1986 on which the State Party could have financed the broadcast of Wirth Facts #1 without any risk that the Commission would contend that the expenditure fell within Section 441a(d), and explain.

Response. This question calls for the counsel for the Commission to speculate as to what the Commission might have done under different facts than were presented in this case. Without conceding that interrogatories seeking conclusions of law unrelated to the facts of the case are appropriate under the Federal Rules of Civil Procedure, the Commission notes that the Federal Election Campaign Act established a procedure whereby any person may obtain an advisory opinion from the Commission concerning the application of the Act to any specific transaction or activity by the requester. 2 U.S.C. § 437f(a). That provision specifies, however, that "[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section." 2 U.S.C. § 437f(b).

Since defendants have neither proposed undertaking the activity discussed in this interrogatory nor requested an advisory opinion pursuant to 2 U.S.C. § 437f, counsel for the Commission can only respond that if the Wirth Facts #1 ad had been financed and aired on other dates in 1985 and 1986, and been the subject of an administrative complaint, the Commission would have addressed the question whether the expenditure that paid for the ad was made in connection with the general election campaign of a candidate for federal office, just as it addressed that question with respect to the ads which were the subject matter of the administrative complaint.

Without waiving any of the foregoing objections, counsel for the Commission notes that while the timing of an advertisement relative to the the other facts of a particular case can be relevant to the determination whether an expenditure is "in connection with the general election campaign or candidates for Federal office" under 2 U.S.C. § 441a(d), neither the statute nor the Commission's regulations establish any specific cut-off dates for use in making such determinations.

Respectfully submitted,

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

/s/ Robert W. Bonham, III
ROBERT W. BONHAM, III
Acting Assistant General Counsel

/s/ Charles W. Snyder
CHARLES W. SNYDER
Attorney

April 16, 1990

For the Plaintiff
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

COUNTY OF DENVER)
)
STATE OF COLORADO)

AFFIDAVIT OF BRUCE BENSON

BRUCE BENSON, being first duly sworn, deposes and says:

1. I am Bruce Benson. I have been the Chairman of the Republican Party of Colorado ("State Party") since 1987.

2. The registered federal account of the State Party is called the Colorado Republican Federal Campaign Committee and is the subject of this civil action brought by the Federal Election Commission.

3. The State Party fully intends to participate in the 1990 elections to be held in the State of Colorado. Further, the State Party intends to pay for communications within the spending limits of 2 U.S.C. section 441a(d).

4. However, the State Party would also like to pay for communications which costs exceed the spending limits of 2 U.S.C. section 441a(d), but will not do so due to the deterrent and chilling effect of the statute. In future elections the State Party similarly will be deterred from financing communications which costs exceed the spending limits of 2 U.S.C. section 441a(d).

5. These statutory limits are restricting the State Party from carrying on its role as the Republican Party of Colorado in that they are inhibiting the State Party from participating freely in the public debate surrounding elections for federal office.

/s/ Bruce Benson
BRUCE BENSON

[Notary Omitted in Printing]

WIRTH FACTS #1

The following is a transcript of the State Committee's radio broadcast discussing Congressman Wirth's positions on defense:

"Paid for by the Colorado Republican State Central Committee

Here in Colorado we're use to politicans who let you known where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

WIRTH FACTS #2

The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth' position on telecommunications policy:

* * *

Ringing phone.

Voice: "When it comes to telephone service, a lot has changed in the last few years—none of it for the better."

Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion.

So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts, Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial tone.

* * *

WIRTH FACTS #3

The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth's position on telecommunications policy and on the credibility of his statements on the issue:

"Paid for by the Colorado Republican State Central Committee

There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R.5158 gave "legislative sanction to the divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking-up the phone company was a bad idea, but as far as we could tell that' s what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts."

Tim Wirth Says He Wants A Strong Defense For America?

Then Why Doesn't

Tim Wirth is spending a lot of money these days to try and convince people in Colorado that he really wants our country to have a strong, modern military ready to defend our borders and our friends abroad.

☑ **NO** Wirth voted **against** the Strategic Defense Initiative program to protect America against Russian missiles. (Congressional Quarterly 164, June 30, 1985.)

☑ **NO** Wirth voted **against** building the new B-1 bomber to replace the outmoded B-52s that have been in our airforce since the Korean War. (Congressional Quarterly 149, May 23, 1984.)

☑ **NO** Wirth voted **against** funding important defense weapons 48 times since 1975. (The Congressional Record.)

He Vote That Way?

Thousands of dollars in slick television ads may change a few minds, but it can't change the facts.

Take a look at how Tim Wirth has voted on issues in Congress that directly affect the strength of our defense system.

☑ **YES** Wirth sponsored legislation to allow people who objected to the military **not to have their tax dollars pay for national defense.** (HR 3652, July 17, 1985.)

☑ **YES** Wirth voted to protect **draft dodgers** from having their college aid cut off by the Federal government. (Congressional Quarterly 311, July 20, 1982.)

☑ **YES** Wirth voted to cut $108 million from **civil defense** programs designed to protect non-military personnel. (Congressional Quarterly 215, July 31, 1982.)

"It's absolutely **criminal** the amount of money this country is spending on defense."

Congressman Tim Wirth

The Rocky Mountain News
May 21, 1983

Tim Wirth is the kind of politician who wants it both ways.

He wants the liberal, anti-defense crowd back in Washington to know that they can count on him when it comes time to kill any effort to modernize our military.

That's why in Congress, he's **voted against every major new weapons system in the past five years.**

But back here in Colorado, he wants folks to believe that he thinks America should have the best system of national defense that money can buy.

Which is the real Tim Wirth?

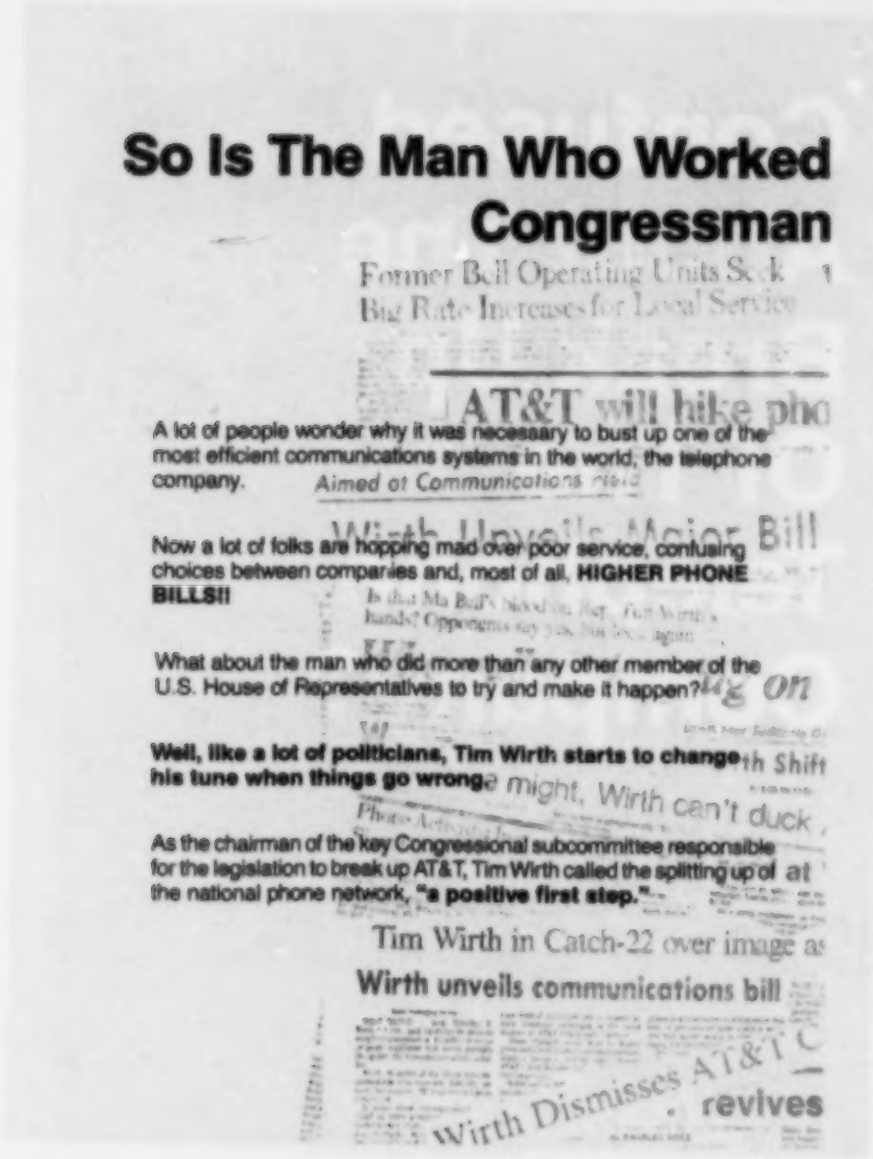
Check the record inside.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Finance Committee

Confused About The Break Up Of The Telephone Company?

So Is The Man Who Worked Congressman



A lot of people wonder why it was necessary to bust up one of the most efficient communications systems in the world, the telephone company.

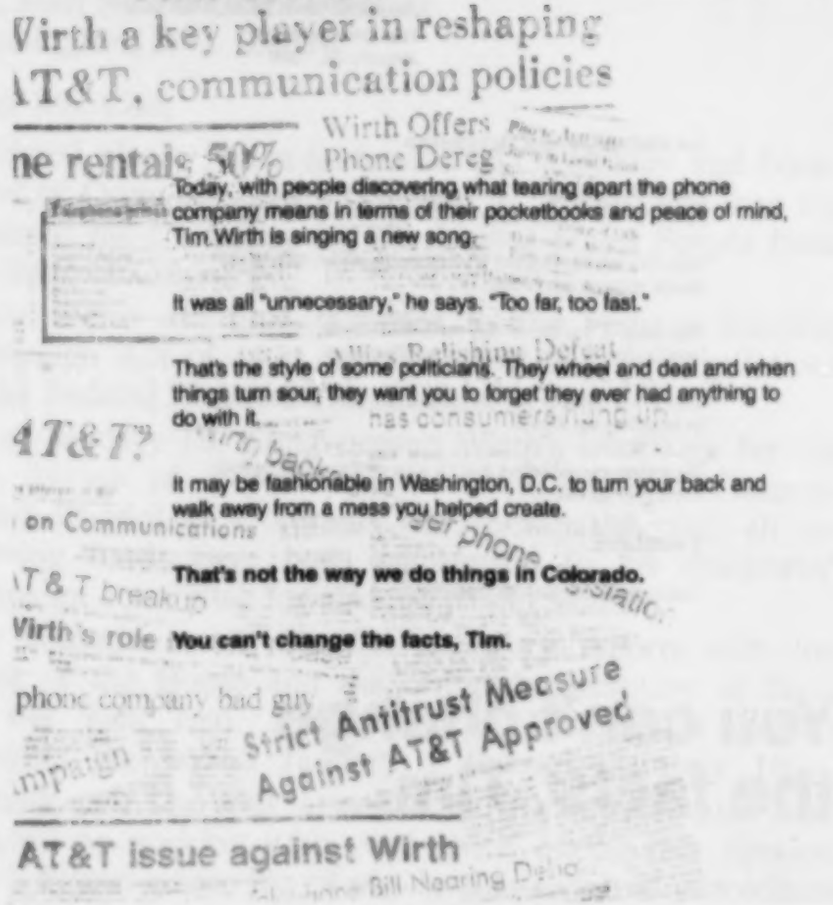
Now a lot of folks are hopping mad over poor service, confusing choices between companies and, most of all, **HIGHER PHONE BILLS!!**

What about the man who did more than any other member of the U.S. House of Representatives to try and make it happen?

Well, like a lot of politicians, Tim Wirth starts to change his tune when things go wrong.

As the chairman of the key Congressional subcommittee responsible for the legislation to break up AT&T, Tim Wirth called the splitting up of at the national phone network, **"a positive first step."**

The Hardest To Make It Happen
Tim Wirth



"Everyone I have spoken with thinks that the AT&T divestiture has been a disaster and that the Congressman (Tim Wirth) had a lot to do with it...if people hold him personally responsible for the telephone break up, he's going to have big problems."

Columnist David Ethan Greenberg
The Denver Post
January 12, 1986

Tim Wirth **does** have big problems.

People in Colorado are having big problems getting the kind of phone service they deserve and at a fair price.

With Tim Wirth's support and encouragement America's phone system was broken up.

The result is that we all pay more and pay for things we used to get for free, like directory information.

Tim Wirth wants you to forget the role he played in busting up AT&T.

He wants you to believe that it's all a mistake and he had nothing to do with it.

It won't work.

Coloradans are smarter than that.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Central Committee

WIRTH
Committee for Tim Wirth
P.O. Box 576
Westminster, Colorado 80030
[telephone number omitted]

January 16, 1986

The Honorable Joanne Coe
Secretary of the Senate
Office of Public Records
232 Hart Senate Office Building
Washington, D.C. 20510

Dear Ms. Coe:

Enclosed please find a Statement of Candidacy and Statement of Organization for Timothy E. Wirth, who has announced his candidacy for the United States Senate from the State of Colorado.

These forms are filed pursuant to the Federal Election Campaign Act of 1971, as amended, and the regulations of the Federal Election Commission.

As of January 16, Congressman Wirth's campaign for the U.S. House of Representatives from the 2nd Congressional District of Colorado was terminated, and all remaining funds have been transferred to his designated campaign committee for election to the Senate.

Our committee will file the necessary reports with the Clerk of the House and the Colorado Secretary of State for the Year End, 1985, and the Termination Report covering the period January 1 through January 16.

I thank you for your attention to this matter, and look forward to working with your office during this election year. Please advise me of any further required procedures regarding formal notification of Tim's candidacy.

Sincerely,

/s/ Joanne C. Bryant
JOANNE C. BRYANT
Treasurer

STATEMENT OF CANDIDACY

1 (a) Name of Candidate (in Full)

Timothy E. Wirth

(b) Address (Number and Street)

12 Chautauqua Park

(c) City, State and ZIP Code

Boulder, Colorado 80302

2 [illegible]

3 Party Affiliation

Democrat

4 Office Sought

United States Senate

5 District & State of Candidacy

Colorado

DESIGNATION OF PRINCIPAL CAMPAIGN COMMITTEE

6 I hereby designate the following named political committee as my Principal Campaign Committee for the 1986 election(s).
(Year of Election)

NOTE: This designation must be filed with the appropriate office noted below.

(a) Name of Committee (in Full)

Committee for Tim Wirth, Inc.

(b) Address (Number and Street)

P.O. Box 576

(c) City, State and ZIP Code

Westminster, Colorado 80030

DESIGNATION OF OTHER AUTHORIZED COMMITTEES

7 I hereby authorize the following named committee, which is NOT my principal campaign committee, to receive and expend funds on behalf of my candidacy.

NOTE: This designation should be filed with the principal campaign committee.

(a) Name of Committee (in Full)

(b) Address (Number and Street)

(c) City, State and ZIP Code

I certify that I have examined this Statement and to the best of my knowledge and belief it is true, correct and complete.

x Timothy E. Wirth
(Signature of Candidate)

January 16, 1986
(Date)

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Statement to the penalties of 2 U.S.C. §437g.

CANDIDATES FOR --

President mail to:	U.S. Senate mail to:	U.S. House of Representatives mail to:		
Federal Election Commission 1325 K Street, N.W. Washington, D.C. 20463	Secretary of the Senate 119 D Street, N.E. Washington, D.C. 20510	Clerk of the House 1036 Longworth Office Bldg. Washington, D.C. 20515	For further information contact:	Federal Election Commission Toll Free 800-424-9530 Local 202-523-4068

FEC FORM 2 (1/86)

NATIONAL REPUBLICAN
SENATORIAL COMMITTEE

SENATOR JOHN HEINZ
Chairman
TOM GRISCOM
Executive Director

AGREEMENT

By this agreement, the Colorado Republican Party authorizes the National Republican Senatorial Committee to serve as its agent for the purpose of making one hundred percent of the expenditures allowed under 2 U.S.C. 441a(d)(6) in the State of Colorado for the 1986 election for the United States Senate.

By the signature below, Howard H. Callaway hereby represents that s/he is authorized to enter into this agreement.

/s/ Howard H. Callaway
State Chairman

Date March 14, 1986

/s/ Scott Cottington
Political Director,
National Republican
Senatorial Committee

Date 3-24-86

REPORT OF RECEIPTS AND DISBURSEMENTS
For a Political Committee Other Than an Authorized Committee

(Summary Page)

1. Name of Committee (In Full)
Colorado Republican Federal Campaign Committee

Address (Number and Street)
1275 Tremont Place

City, State and ZIP Code
Denver, Co. 80204

☐ Check here if address is different than previously reported.

2. FEC Identification Number
C00033134

3. ☐ This committee qualified as a multicandidate committee during this Reporting Period on _____ (Date)

4. TYPE OF REPORT (Check appropriate box(es))

(a) ☐ April 15 Quarterly Report ☐ October 15 Quarterly Report
☒ July 15 Quarterly Report ☐ January 31 Year End Report
☐ July 31 Mid Year Report (Non-Election Year Only)
☐ Monthly Report for _____
☐ Twelfth day report preceding _____ _____ (Type of Election) election on _____ in the State of _____
☐ Thirtieth day report following the General Election on _____ in the State of _____
☐ Termination Report

(b) Is this Report an Amendment?
☒ YES ☐ NO

SUMMARY	COLUMN A This Period	COLUMN B Calendar Year-to-Date
5. Covering Period 11-1-84 through 6-30-85		
6.(a) Cash on hand January 1, 19 84		$ 32,881.69
(b) Cash on Hand at Beginning of Reporting Period	$ 277,597.85	
(c) Total Receipts (from Line 18)	$ 177,770.03	$ 498,599.71
(d) Subtotal (add Lines 6(b) and 6(c) for Column A and Line 6(a) and 6(c) for Column B)	$ 455,367.88	$ 531,281.40
7. Total Disbursements (from Line 28)	$ 249,058.05	$ 324,971.57
8. Cash on Hand at Close of Reporting Period (subtract Line 7 from Line 6(d))	$ 206,309.83	$ 206,309.83
9. Debts and Obligations Owed TO The Committee (Itemize all on Schedule C or Schedule D)	$	
10. Debts and Obligations Owed BY the Committee (Itemize all on Schedule C or Schedule D)	$ 120,716.00	

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Vincent A. Zarlengo
Type or Print Name of Treasurer

Vincent A. Zarlengo
SIGNATURE OF TREASURER

7/25/85
Date

For further information contact:
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
Toll Free 800-424-9530
Local 202 376-3120

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this report to the penalties of 2 U.S.C. § 437g

All previous versions of FEC FORM 3 and FEC FORM 3a are obsolete and should no longer be used.

FEC FORM 3X (3/80)

177

DETAILED SUMMARY PAGE
of Receipts and Disbursements
(Page 2, FEC FORM 3X)

Name of Committee (in Full): Colorado Republican Federal Campaign Committee

Report Covering the Period: From: 4-1-86 To: 6-30-86

	COLUMN A Total This Period	COLUMN B Calendar Year-To-Date	
I. RECEIPTS			
11. CONTRIBUTIONS (other than loans) FROM:			
(a) Individuals/Persons Other Than Political Committees	109,726.90	390,713.17	11(a)
(Memo Entry Unitemized $ 22,551.90)			
(b) Political Party Committees			11(b)
(c) Other Political Committees		700.00	11(c)
(d) TOTAL CONTRIBUTIONS (other than loans) (add 11(a), 11(b) and 11(c))	109,726.90	391,413.17	11(d)
12. TRANSFERS FROM AFFILIATED/OTHER PARTY COMMITTEES	50,000.00	78,800.00	12
13. ALL LOANS RECEIVED			13
14. LOAN REPAYMENTS RECEIVED			14
15. OFFSETS TO OPERATING EXPENDITURES (Refunds, Rebates, etc.)	47.15	47.15	15
16. REFUNDS OF CONTRIBUTIONS MADE TO FEDERAL CANDIDATES AND OTHER POLITICAL COMMITTEES			16
17. OTHER RECEIPTS (Dividends, Interest, etc.) Interest	26,995.98	28,939.39	17
18. TOTAL RECEIPTS (Add 11(d), 12, 13, 14, 15, 16 and 17)	186,770.03	498,999.71	18
II. DISBURSEMENTS			
19. OPERATING EXPENDITURES	86,716.29	94,221.81	19
20. TRANSFERS TO AFFILIATED/OTHER PARTY COMMITTEES	125,000.00	193,333.00	20
21. CONTRIBUTIONS TO FEDERAL CANDIDATES AND OTHER POLITICAL COMMITTEES	13,500.00	13,500.00	21
22. INDEPENDENT EXPENDITURES (use Schedule E)			22
23. COORDINATED EXPENDITURES MADE BY PARTY COMMITTEES (2 U.S.C. §441 a(d)) (Use Schedule F)			23
24. LOAN REPAYMENTS MADE			24
25. LOANS MADE			25
26. REFUNDS OF CONTRIBUTIONS TO			
(a) Individuals/Persons Other Than Political Committees NEP	25.00	100.00	26(a)
(b) Political Party Committees			26(b)
(c) Other Political Committees			26(c)
(d) TOTAL CONTRIBUTION REFUNDS (Add 26(a), 26(b) and 26(c))	25.00	100.00	26(d)
27. OTHER DISBURSEMENTS	23,816.76	23,816.76	27
28. TOTAL DISBURSEMENTS (add lines 19, 20, 21, 22, 23, 24, 25, 26(d) and 27)	245,058.05	324,971.57	28
III. NET CONTRIBUTIONS AND NET OPERATING EXPENDITURES			
29. TOTAL CONTRIBUTIONS (other than loans) from Line 11(d)	109,726.90	390,713.17	29
30. TOTAL CONTRIBUTION REFUNDS from Line 26(d)	25.00	100.00	30
31. NET CONTRIBUTIONS (other than loans) (Subtract Line 30 from Line 29)	109,701.90	390,613.17	31
32. TOTAL OPERATING EXPENDITURES from Line 19	86,216.29	94,221.81	32
33. OFFSETS TO OPERATING EXPENDITURES from Line 15	47.15	47.15	33
34. NET OPERATING EXPENDITURES (Subtract Line 33 from Line 32)	86,169.14	94,174.66	34

SCHEDULE B **ITEMIZED DISBURSEMENTS**

Use a separate schedule(s) for each category of the Detailed Summary Page

PAGE 1 OF 1

FOR LINE NUMBER 19

Any information copied from such Reports and Statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee.

NAME OF COMMITTEE (In Full)

Colorado Republican Federal Campaign Committee

	Purpose of Disbursement	Date (month, day, year)	Amount of Each Disbursement This Period
A. Full Name, Mailing Address and ZIP Code Colorado Media Group 5670 S Syracuse Circle Englewood, CO 80111	Voter information to Colorado Voters - Advertising Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	4-24-86 5-1-86 5-21-86	15,000.00 15,000.00 10,000.00
B. Full Name, Mailing Address and ZIP Code Odell, Roper & Associates 165 S. Union Blvd #250 Denver, CO 80228	Purpose of Disbursement Voter information mailing to Colorado Voters Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	4-9-86 4-21-86 5-28-86	14,250.00 20,700.00 7,769.34
C. Full Name, Mailing Address and ZIP Code Arthur Andersen & Co 717 - 17th Street #1900 Denver, Co 80202	Purpose of Disbursement 1985 Audit Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 11-10-86	Amount of Each Disbursement This Period 1500.00
D. Full Name, Mailing Address and ZIP Code Quasar Computer Service 1909 N Academy Blvd Colorado Springs, Co 80909	Purpose of Disbursement Bookkeeping Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 4-10-86	Amount of Each Disbursement This Period 33.03
E. Full Name, Mailing Address and ZIP Code Michael Meyers 415 W. Foothill Suite 118 Claremont Ca 91711	Purpose of Disbursement Consulting Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 4-10-86	Amount of Each Disbursement This Period 2500.00
F. Full Name, Mailing Address and ZIP Code Central Bank of Denver P.O. Box 5548 Denver, CO 80217	Purpose of Disbursement Service Charges Print Checks/Deposit Slips Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year) 4-1-86 5-1-86 5-27-86	Amount of Each Disbursement This Period 20.39 3.23 9.08
G. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year)	Amount of Each Disbursement This Period
H. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year)	Amount of Each Disbursement This Period
I. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement Disbursement for: ☐ Primary ☐ General ☐ Other (specify)	Date (month, day, year)	Amount of Each Disbursement This Period

SUBTOTAL of Disbursements This Page (optional)	
TOTAL This Period (last page this line number only)	86,716.29

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 23, 1988

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal
Campaign Committee and
Vincent Zarlengo, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probably cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434 (b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

January 17, 1989

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal
Campaign Committee and
Douglas L. Jones, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d). Additionally, on September 12, 1988, the Commission denied your Motion for Reconsideration of Probable Cause.

On September 29, 1988, based upon the fact that your clients had changed its treasurer prior to the Commission's probable cause determination, the Office of the General Counsel provided you with a supplemental brief regarding the General Counsel's intention to recommend to the Commission that there is probable cause to believe the current treasurer violated the above-noted sections of the Act.

On January 10, 1989, the Commission found that there is probable cause to believe Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Commit-

tee, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

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Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1159

FEDERAL ELECTION COMMISSION,
Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,
Defendants.

DEPOSITION OF HOWARD H. CALLAWAY

Washington, D.C.
Tuesday, May 5, 1990

* * * *

[3] PROCEEDINGS

Whereupon,

HOWARD H. CALLAWAY

was called as a witness and, having first been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KELLNER:

Q To start off, we are here in connection with the litigation entitled Federal Election Commission versus the Colorado Republican Federal Campaign Committee and Douglas L. Jones as treasurer.

My name is Kenneth Kellner and with me, representing the Commission, is Rob Bonham. The witness is appearing in our office in Washington rather than in Grand Junction, Colorado pursuant to an agreement between counsel of both sides.

Opposing counsel and I agreed all stipulations will be reserved except as to form and the witness may review the transcript for errors and sign it before any notary public.

What is your address?

A 3131 East Alameda, Apartment 2103, Denver, [4] Colorado 80209.

Q What is your business address?

A First of all, the Crested Butte Mountain Resort, P.O. Box A, Mount Crested Butte, Colorado, or I have an office in Denver which is at 1900 Grant Street, Apartment 850, Denver, 80203.

Q How long have you lived at that address?

A Since 1980.

Q Have you ever been deposed before?

A Yes.

Q What were the circumstances surrounding those depositions?

A They were business circumstances. One, as I recall—I forget the deposition, I just talked to the attorneys—but one, as I recall, is in connection with an antitrust suit of a business that I am involved with. I am not certain of any depositions as Secretary of the Army. I had a number of legal matters and some may have involved deposition and I had meetings with attorneys about that.

Q Even though you have gone through this sometime before, I am going to go over some instructions with you. [5] Basically I will be asking you a series of questions. If at any time you don't understand the question, let me know and I can rephrase or repeat the question. If you don't indicate that you don't understand the question and you answer it, it will be assumed that you answered the questions to the best of your knowledge.

The court reporter will take down everything that you say and will prepare a transcript of this deposition and it is very important that you answer every question in

words because the reporter cannot record nods or any signs that are not spoken. Do you understand?

A Yes.

Q You have the right to have counsel with you at this deposition? Do you have counsel with you today?

A Yes.

Q Can you identify counsel?

A Tom Kirby and Carol Laham.

Q Is counsel representing your personally?

A Yes.

MR. KELLNER: Mr. Kirby, does your firm represent any of the parties in this matter?

MR. KIRBY: We represent all of the Defendants [6] in this matter.

BY MR. KELLNER:

Q Mr. Callaway, what, if anything, did you do in preparation for this deposition?

A I talked to my counsel about—

MR. KIRBY: Don't tell him what you talked to me about.

THE WITNESS: —about three weeks ago, my recollection is about three weeks ago, for maybe 30 or 40 minutes and I talked with him yesterday for an hour.

BY MR. KELLNER:

Q Were the discussions meant to be confidential?

A Oh, yes.

Q Did you discuss this matter with anyone other than counsel?

A Not substantively. I have discussed it with some of my associates at GOPAC where I work. I discussed it at some length with members of the Republican National Committee that I met with within the last six months as a minor part of what I was talking about. I generally go to national committee meetings to give a talk on GOPAC and meet former colleagues of mine

and I talked to them about [7] it, sort of a "what-is-happening" kind of thing, nothing substantive.

Q What was the nature of your discussions with—

MR. KIRBY: Before you answer that quesion, let me make a general observation and objection.

Mr. Callaway is testifying as a former head of a political party. He is being asked about political activities by a governmental agency. That is a serious intrusion of the First Amendment, and at the last hearing we had, the magistrate admonished Mr. Snyder, who is no longer here, that he seemed insensitive to the First Amendment overtones of this proceeding.

I hope what you will do is focus your questions very narrowly, very tightly, on exactly what you told the court is relevant to this proceeding because if you try to launch some fishing expedition of a general inquiry into Mr. Callaway's political activity, we will not do that. All right?

You may answer the question.

THE WITNESS: Repeat it, please.

MR. KELLNER: Read back the question, please.

(The reporter read the record as requested.)

[8] THE WITNESS: The nature broadly was most of the discussion was what is a political party allowed to do under the law as it is currently interpreted, what is a political party allowed to do to fulfill its fundamental purpose of holding the other party responsible without being stopped by the law. Members of both parties that I have been connected with feel strongly that the parties are the best people to make democracy work.

We would not be involved in the parties if we didn't believe that and are very, very concerned about anything that has an effect which, as it certainly did when I was chairman, of stopping parties from doing what we think is their responsibility to their constituents, the responsibility to their donors and responsibility to the public and clearly their right under the law in our opinion.

BY MR. KELLNER:

Q Why did you hold these discussions?

A I would not have been chairman of the party if it was not important to me. It is enormously important to me that parties be active and be allowed to do what they are designed to do and I take it very seriously when I am [9] stopped from doing that.

Q Did you bring any documents with you today?

A No. I brought some but nothing that bears on this case with the exception of your address. That is the only thing.

Q Did you review any documents in preparation for the deposition?

A No.

Q Where are you presently employed?

A I own the Crested Butte Mountain Resort and while I am not on the payroll per se as a shareholder, I would say that is employment and that is the address I gave you, P.O. Box A, Mount Crested Butte, Colorado.

Q Earlier you mentioned GOPAC. What is GOPAC?

A That is a nonfederal PAC that has the purpose of electing Republicans to Congress and hopefully controlling the Congress by the Republican Party by recruiting people who run primarily for the state and state legislature, recruiting and training and preparing, so that when the time is right to run for Congress, they will be prepared to do so. Once they run for Congress we have nothing further to do with them and we do not contribute to the [10] federal campaign in any way but contribute to state and local campaigns generally in all 50 states.

Q Was GOPAC your first involvement with politics?

A No.

Q Can you summarize some of your political involvement over the last 20 years or so?

A Twenty years, I will start with elected office.

In 1962 I was very involved in the Draft Goldwater movement. I was a deelgate to the Republican National Committee convention in 1964 in San Francisco. I ran

for Congress in 1964 and was elected in that year and served in the 89th Congress.

In 1966 I ran for governor as a Republican nominee of Georgia, and in 1980 I ran for the U.S. Senate as a Republican in Colorado. I ran in the primary but did not win the primary. And in 1981 I became chairman of the Colorado Republican Party until 1986 with three terms, or six years.

Q Since then?

A My political activity, other than personal contributions I may have given or personal conversations that I have with a great many people that I know and [11] respect, has been with GOPAC. I became chairman of GOPAC about February 1987.

Q. I would like to focus on your activity with—activity in 1981 to 1986.

A If I said '86 it went to '87. It was '81 to '87. Three consecutive two-year terms.

Q Is that a full-time position?

A No.

Q Were you employed outside of the party?

A I was owner the Crested Butte Mountain Resort and part of the time as president on the payroll and part of the time as owner, but as the owner I consider that employment because distributions made to the owner is my source of employment. Not being technically on the payroll is a technicality. As far as I was concerned I was employed by Crested Butte Mountain Resort at that time.

MR. KIRBY: He is not and has not been a vagrant.

BY MR. KELLNER:

Q Were you involved with the party prior to becoming chairman?

[12] A As a candidate for office I obviously worked with the campaign work very closely. I was not involved in any precinct chairman or district chairman of anything of that kind.

Q How did you come to become chairman?

A Having run a campaign throughout the state I became well known. I worked through the state convention for the nominating process. Obviously, I worked with active Republicans and was able to make enough friends that when I wanted to continue my political activity and announced, I was elected without opposition.

Q What were your duties and responsibilities as chairman?

A Very broad. The bylaws of the Colorado Republican party then, and as far as I know now, pretty much give control of the party to the chairman. There is an executive committee.

The chairman gets to appoint—as I recall, eight members of the executive committee and a number of others are ex officio, but the executive committee has never, in my time that I was there, has never on a broad policy matter overruled the chairman, so for practical [13] purposes the chairman ran the party.

Obviously the chairman is responsible to the central committee which is the official body of the Colorado party. The central committee never gave day-to-day instructions. The central committee was more concerned with things like nominating candidates, and that sort of thing.

Q How many were there in the central committee?

MR. KIRBY: At what time?

THE WITNESS. At the time I was there I will pick a number that is fairly close and say 350 to 400.

BY MR. KELLNER:

Q And at the time you were there, and I would like to focus the questions on that time, how many were there on the executive committee?

A About 20.

Q Can you tell me in more detail what your duties and responsibilities were as chairman?

A They included the whole gamut of things that parties do. They include responsibilities for fundraising. Although I had a finance committee that I appointed, the finance director was a person that I hired, [14] the financing staff was a staff that I hired.

The direct mail was done under my supervision, direct mail fundraising, and the fundraising was primarily from direct mail and from three principal groups; the 250 Club, which is $250 a year, and the Elephant Club, which is $1000 a year, and the Chairman Circle, which is $5,000 a year. The Chairman Circle started while I was there.

A large part of the time is involved with major donors and talking with them and working with them and the lesser part of the time is supervising things like direct mail. Obviously without financing you have nothing, so that was sort of a prime responsibility.

Next responsibility was coordination with the National Committees. I frequently coordinated with the Republican National Committee and the National Republican Congressional Committee, the National Senatorial Campaign Committee, trying to work ways to be more effective in joint cooperation.

We were remarkably successful in working very closely with the three committees which is not the norm in the state party. The operation of the staff was my responsibility, a relatively small staff, and the hiring [15] and firing of the staff, delegating duties to that staff was my responsibility. Recruiting candidates, seeing candidates are well financed, training, and we did something most parties have not done before or since and maintaind a very efficient computer program list, maintaining lists so any candidate at any level, preprimary or postprimary, we would give lists to so they can use that in the neighborhood or direct mail and that was available in a very quick turnaround time in ways that were specifically desgined to

hit Democratic areas by zip codes or whatever, and I probably left out some things, but it is fair to say the operation of the entire Repubican Party at the state level, including coordination with the various county chairman and county committees, I mean very broad powers to the chairman in the state of Colorado.

Q This would include coordination with campaign committees?

A Yes. To the extent they were willing to be coordinated. Naturally some are coordinated better than others. The party never took a position in primary. My position was we would help both equally. The position [16] before I got there was we would help neither. But we did not take positions between parties in primaries. After the primary it was our job to give full support to the nominee.

Q Was there any individual with greater authority than you when you were chairman?

A No. Not in party matters. You may consider Bill Armstrong as titular head of the party but that is because he is a GOP Senator. In the Republican Party, no. No one else had real power except Advisory through the executive committee.

Q What is your association with the state party currently?

A I am a donor to the state party. I probably called Bruce Benson, the man who took my place, once every three or four months, and I would say I am very inactive. The worst thing a former chairman can do is to pretend he is still chairman.

Q What is the Colorado Republican Federal Campaign Committee?

A That is the campaign committee that we very carefully saw to it in the vernacular had corporate clean [17] money, not that they were not both clean but it was accepted under the limits of the Federal Campaign Law. Colorado is corporate state so the Colorado party could accept corporate checks but the federal campaign funds could not.

This was a campaign committee that we scrupulously kept for moneys that could be used for federal campaigns and whenever we wanted to use money for a federal campaign we would use that money. In other words, money can flow one way but not the other.

We could use federal money for a state race but not—we can use, we could use federal money to apply to a state race if we so chose but we could not use state money to apply to a federal race, because it has not cleared all the hurdles of raising for federal campaigns. There may have been corporate money there, there may have been tainted money that could not have been used, so it was kept separate.

Q Who controlled the operations of that federal committee?

A I did.

Q Did your role in the federal committee differ [18] from your role as state party chairman?

A I don't think in any way it differed. There were two different ways to separate the money but my role was the same and both was to help Republicans and hold Democrats accountable.

Q Did the state party or the federal committee have different goals?

A No, no different goals. They are the same. As I said, if our goal translated to a Congressional race, the funds would come out of a federal committee. If there was a goal for a governor race, the funds most likely, but not necessarily, would come out of the state campaign funds.

Q What would these goals be?

A The goals of the Republican Party I think are pretty clear throughout the country. It is to recruit candidates and assist candidates to become elected and elect candidates and to hold the Democratic Party and its leaders accountable. That is the fundamental thing the party does and you have to raise money to do that and other things come along but that is what you are doing.

Q What was your involvement in planning campaign [19] strategy?

A Quite detailed. I had run for office myself and I was involved in it.

Q What things would you do?

A If you say campaign strategy as it affects a particular race, that would be coordinated with the candidate. As far as campaign strategy for the legislature, which was a major part of what we did, we would try to have a pretty coordinated campaign for the entire legislature, the state house, state senate, to include such things as incumbency programs, how could we keep a candidate strong?

But when you get to the individual campaign we would assist with their design, assist with strategy, assist with telling how to fundraise. We tried to be as helpful as we could. In the smaller races. Almost always the campaign manager is a volunteer and many times has never done it before, and it is obviously invaluable.

As you get to the bigger races, the congressional and Senate and governors, they generally have fairly professional campaign managers and we become more of an advisor.

[20] Q I would like to focus on 1986. What was your involvement in campaign strategy that year?

A The same as every year. As much as I had time to give to it.

Q What specific things were you involved with that year?

A The same things I just went over. The state legislative level and Congressional level and statewide level. Governors races. Secretary of State races. The same things I went over with you.

Q Was there a Senate race that year?

A Sure was.

Q What was your involvement in planning campaign strategy for that race?

A I was as involved as I could be in that. There was a contest on our side between three people and I

made all of the assets of the party that I could available to all three of them until the convention in which case we merged with the number one candidate and I made them all available to that one candidate. That was Ken Kramer. And I also attempted to hold the Democratic Party responsible in all races including that Senate race.

[21] Q How did you do that?

A Early in '86 before there was any caucuses or before there was any—the way the Colorado elections work, if you are running as a party member, and virtually you cannot run as an independent, if you run as a Democrat or Republican, you first go to the caucus that takes place in the first couple weeks of April, as I recall.

Those caucuses are open to everybody. The Republican caucus is open to all Republicans and the Democrat Caucus is open to all Democrats, and unaffiliates can change registration at the caucus time to go to them so you would say essentially it is open to Republicans and unaffiliates, Democrats and unaffiliated as far as they are concerned—they take place around the first couple weeks in April.

At those caucuses you elect to represent you from among those at the caucus—they don't have to be from among the caucus, people to go to the county convention, people to go the district assemblies.

Usually from the county you elect people from the county and in the statewide race, like the Senate you mentioned, the step would be you go from the caucuses to [22] the county convention to the state convention. At the state convention those who want to run for the U.S. Senate appear to be nominated and the names are put in nomination and voted upon by the entire state convention.

You had to get 20 percent of the people at the convention to go on the ballot. If you went on the ballot, and there were two of you, this meant you entered the primary. At the time we started looking at this, realizing the Senate election was being an open seat, it was enormously important to both parties—that is the time you go

even stronger with a Challenger or incumbent—and we were looking at that and sometime early in that year Tim Wirth began to have press releases. And I don't know if he had a formal announcement, but it was clear he was going to run for the Senate and it was clear he was starting to pitch his version of his record in the Congress.

He did this in several areas. He did it in defense, he did it in the phone company breakup, and in my view what he was saying was so incredibly apart from the facts that I would have truly been derelict to let him get away with it. Here is a leader of the Democratic party as [23] a Congressman—there were only two Democrats, as I recall, at that time. They had a governor but he was certainly in the top four or five leaders and aspiring to lead higher because he had announced or made clear he had a campaign organization building and coming out with statements that were just so far from the record that it was unbelievable. There was nobody to refute that. We had no candidate.

At that moment no candidate on the Democratic side had come out. I didn't know if one would come out or not, but clearly at that time he was getting away with saying things that were not being refuted by anyone and we had no candidate to refute it, and the only possible person to refute that was the party, the only one that I know of and I held press conference and we placed ads, radio and mail, and we said here are the facts, and the facts are not what Tim said the facts were, and here is a man who, like most congressmen, is running for election, the time is a two-year term and he is always running for election and he is unopposed by anybody and I thought if the party does not do something, he will have had many months until either a Democratic opponent emerges or a [24] Republican gets through the primary phase and at which time people would have heard his story unopposed for so long, whether he runs for Congress or governor or Senate, or whatever he runs for, he is out there being unopposed and he needs to be opposed.

Q Why?

A I believe in the two-party system. I happen to believe that what makes America great politically is an adversarial system. You don't say to someone just because an incumbent they can get away with whatever they want without being opposed. What is a party for? That is what the party is for, to hold the other side accountable, to keep them from making what I thought were outrageous statements, outrageously inaccurate, and if I am not allowed—what is the party for? We talked about many other things the party is for but that is a large part of what a party is for.

Q You mentioned that you put out ads. Can you tell me more about them?

A The ads were primarily direct mail in which case it was fairly new to Colorado. Instead of just a letter it was a bright almost like a poster kind of ad or maybe a [25] large 8½ by 11 folder that opened up in bright red or blue with a theme on the cover, or on radio or on television, but as I recall it was just direct mail and the radio, and the theme of all of them was you can't play with the facts the way that he was doing. Here is the record. We point out that record. We pointed out in great specificness with we were specific about individual votes that did not tally with what the campaign rhetoric was coming on the other side.

Q So what did you do? You put out your own ads?

A Yes.

Q Can you tell us more about those?

A I said they were direct mail with the particular colored kind of bold direct mail and they were radio ads and all of the theme of "you got to tell the truth, Tim Wirth, and tell the truth how you voted. You cannot say you are for strong defense when you voted against defense. The record shows that you broke up the telephone company."

Q If I showed you a script of one such ad would you recognize it?

A Probably.

[26] MR. KIRBY: It probably depends on what it is a script of.

THE WITNESS: It has been a good while ago but I think I would.

MR. KELLNER: Mark this as Exhibit 1.

(Callaway Exhibit 1 identified.)

MR. KIRBY: For the record, this is the ad we have referred to as Exhibit 1 and there is no dispute that the Defendant party sponsored that ad.

BY MR. KELLNER:

Q Do you recognize the script?

A As far as I can tell it appears to be the ad that we placed, yes.

Q This is a script used in a radio ad?

A Yes.

Q Who wrote the script?

A I don't know who wrote the script. I know I approved it.

Q Did anyone else approve it?

A No one could have approved it in the sense of approving it. Whether, you know—I really don't know who wrote it. We talked about it around the office. I [27] don't know.

Q Who else reviewed the script prior to its airing?

A I am not sure. It is possible that the executive director or the political director of the party would read the script.

Q What were their names?

A Executive director was Kay Riddle; the political director was Doug Goodyear.

Q Are they still associated with the party?

A Doug Goodyear is not. Mrs. Riddle is the national committeewoman from Colorado which is not—some people would say it is technically an officer of the party and others would say it is an officer of the Republican National Committee, but I would say it is associated with the party for the purpose you are asking.

Q How was this ad designed?
A What do you mean?
Q How did the decision to put out this ad come about?
A I had served as secretary of the Army when Tim Wirth came to Congress. Even though I didn't live in [28] Colorado in those days I was familiar with Colorado politics and that is what happened, and Tim Wirth was so obviously, to those of us in the Pentagon or the Defense Department, a person who had agenda for often called liberal agenda for reducing defense, it was obvious, and that is the way he treated him, and I don't recall when I first heard him, but he came out sometime around the first of that year, first of '86, with a statement saying what America needs is a strong defense and the willingness to pay for it. And I was flabbergasted.

Here was a guy that had been fighting this every day of his life. He fought me as Secretary of the Army and fought the Secretary of the Army after us and voted virtually against every key vote that was important. Any of the key amendment for the Army, Navy, Air Force and Marines, voted against them time after time and I thought that was outrageous. I said who is going to call this to the people's attention, and there was no one else so I had held press conferences and took these ads and I don't know what else you would do.

Q Why would you want to call it to people's attention?

[29] MR. KIRBY: I will allow him to answer these questions because he seems to be doing it just fine, but that kind of questioning of a leader of the political party in this kind of proceeding indicates why these types of depositions should not be held. I am asking you to focus on the facts you need and not pursue lectures in civics.

BY MR. KELLNER:

Q Do you recall the question?
A Why did I want to have the ads?

Q I am not sure if I remember it myself.

MR. KELLNER: Would you read back the question?

(The reporter read the record as requested.)

THE WITNESS: Why would I want to call what I saw as a great discrepancy to the people's attention? Mr. Kirby said something about a civics lesson but the purpose of the Republican Party is to hold the other party accountable. When the other party makes an outrageous statement the other party has an obligation—I would have been derelict in my obligation.

Here is a man saying things that are not true. Whether I am right or wrong, I believe that, and if I [30] believe that as chairman of the party and here is a leader of the other party, I've got an obligation. Why wouldn't I want to do it? That is my job that I was elected for.

BY MR. KELLNER:

Q What were you trying to accomplish by doing this?

A I was trying to set the record straight, and whether Tim Wirth ran for Congress or ran for governor or ran for Senate or just stayed as a leader in the party, I wanted to say nobody in the Democratic Party can make such outrageous statements as he was making and get away with it unchallenged, and while the likelihood was that he would run for Senate, and there was talk of Dick Lamb, the current governor, would run, he would have wiped out Tim Wirth.

Pat Schroeder was giving hints she wanted to run. In my opinion Tim Wirth probably would have won it but certainly it would have been a close race. I was just saying here is a leader of the opposition party making statements I think are outrageous and I have an obligation to correct them.

Q Why?

[31] A Ken—

MR. KIRBY: If you feel you answered that question—

THE WITNESS: I feel I have.

MR. KILLNER: We will take a short break.

(Recess.)

MR. KELLNER: Back on the record.

BY MR. KELLNER:

Q I want to discuss in more detail the production of the ad script which is in front of you. Did someone get paid to prepare this ad?

A I don't know. I don't recall anyone being paid.

Q Whose voice was used to read the script over the radio?

A I don't know. As far as I know, the announcer would have been paid but—I assumed it was a paid announcer but I don't know that.

Q Who was involved in its production?

A I am not even sure of that. We use an ad company called Walt Klein Associates from time to time. I am not sure. Someone had to place the bylines and—I am [32] not even sure who it was.

Q Did you authorize contacting that company?

A Yes. If it was Walt Klein, I clearly authorized it but I don't recall if it was Walt Klein or someone else. The production and placing of the ad, I did not place importance on that. We would have done something much more sophisticated than that and it was not the kind of thing you would pay much attention to.

Q What kind of documentation was involved in approving the script and placing the ad?

A "Improving" the script? "Approving" the script?

MR. KIRBY: If you recall.

THE WITNESS: I don't recall any. Normally the way we would work I might have initialed the bottom but I don't know. I probably would have initialed the bottom.

BY MR. KELLNER:

Q Who would present it to you for your initials?

MR. KIRBY: If you can recall.

THE WITNESS: I don't recall but it would be one of the staff persons.

[33] BY MR. KELLNER:

Q I don't want you to answer any questions that you can't recall the answers to but who were some of the staff people that would bring these matters to your attention?

A This being a political matter as opposed to a finance matter, or something of that kind, most likely would be the two I already mentioned, the political director or the executive director.

Q You mentioned Doug Goodyear?

A Yes.

Q Where is he working now?

A To the best of my knowledge—I know he is living in Denver. To the best of my knowledge he is a political consultant who is doing consulting with the Hank Brown for Senate campaign in Colorado, for the baseball stadium in Colorado that a referendum is probably to be held in November on whether the Colorado—Denver builds a major league stadium or not and for a Wayne Alard for Congress Committee. That is all I know about that. I think he is doing those three campaigns and maybe others, but most likely others.

[34] Q Do you know his address?

A No.

Q Were there any meetings held at which this ad was discussed?

A There had to be. I would say there were not, to my knowledge, any meeting in which this ad was discussed as much as there were meetings in which it was discussed that Tim Wirth was making statements that were not true. We went into some effort to document

the things Tim Wirth said in ways that I felt he was not at least telling the whole truth or not telling the truth.

I felt that what I felt was truth should be brought to the people of Colorado. I don't recall—again, the ad was a fairly simple kind of thing. Once you decide here is what Tim Wirth is saying and here is how we have to hold him accountable, the means we have at our disposal, because we could not afford TV, that was more of a decision being made. I don't recall a lot of time being spent on this particular ad.

Q Who attended the meetings at which Wirth was discussed?

A I would say the meetings were frequently [35] one-on-one with Kay Riddle, one-on-one with Doug Goodyear or perhaps the three of us, the vice chairman of the party, a volunteer as I was a volunteer, the other two were paid. Mindy Nicklejohn might have been there. The secretary of the party could have been there for some of them.

Our finance people could have been there from time to time. And the general thrust would have been discussed in any executive committee meeting that occurred at that time. I can't recall if one occurred at that time but it would have been discussed.

The thrust of what we were doing was fairly widely discussed with a number of people. This specific ad was probably not discussed with anybody. Somebody may have handed it to me and I initialed. I don't remember anything about this particular ad except it fit the thrust of what we were doing.

Q At the meetings you mentioned where Wirth was discussed did you take any notes of those meetings?

A I don't think so. If I did, I don't have them now. It was not my habit to take notes.

Q Was there a secretary taking notes?

[36] A No. We didn't work that way.

Q What system do you use for recalling information or readings?

A You hope you have a reasonably good memory.

Q Was Wirth ever discussed at executive committee meetings?

A I don't recall, but he certainly was. We discussed every candidate at every meeting.

Q Were minutes kept of these meetings?

A Yes.

Q Did you save copies of the minutes?

A No.

Q Where would those documents be?

MR. KIRBY: If you know.

THE WITNESS: I don't know. I did not take them from the party when I left.

BY MR. KELLNER:

Q Now, while you were chairman where were the documents kept?

A In file drawers in the Republican Party.

Q They were there when you left?

A As far as I know. Generally, it is the [37] responsibility of the secretary of the party to keep the minutes and that was generally done. They were not kept in the kind of detail—I would be surprised—the kind of detail that would be normal, "Chairman Callaway discussed the six campaigns going on in the state. Next paragraph."

Q You mentioned you didn't take the documents when you left the state party. What documents did you take?

MR. KIRBY: That is a "when did you stop beating your wife" type of question. If you took any documents you may describe them, Mr. Callaway, if you can recall at this late date?

THE WITNESS: This was a volunteer job of mine and this means it was not full-time for the party. And I had no other offices in Denver except this office for parts of that time at least. The documents that I would have taken, or the only ones I recall taking, were those having to do with personal mail or businesses that I am involved with other than the Republican Party.

I don't have—recall taking any documents having to do with the Republican Party. When I left the office of Secretary of the Army, I felt those were [38] institutional property and not my property.

BY MR. KELLNER:

Q When did you find out that Tim Wirth was a candidate for the Senate?

A I guess people had been talking about it, press speculation, and talked about it forever since '74 when he first ran for Congress. People who were close to Tim Wirth said Tim Wirth was going to run for the Senate the first available opportunity and that he would run for president at the first opportunity and he was known by all of us to be a very ambitious person.

None of us thought he would stay in Congress, the rest of his life and there was an open seat coming up and it made it more likely, and I would say the race in '86—around '85 people started talking about that. Sometime around the first of the year, as I recall, he got a campaign committee and began starting doing things.

I don't recall when he physically announced. That was later in March but I don't know—I am not sure whether we did these things before or after he was an announced candidate. But it was a recognized fact by most people that Tim Wirth was going to run for the Senate. If [39] you asked the political reporters, they would say he would run for the Senate. I though he would run for the Senate. For several years before this I thought he would run—

Q As chairman of the state party when did you know your first reaction to Wirth's candidacy or potential candidacy?

A The first time I reacted in a public way was in response to a statement he made, or a press release he made, or perhaps an announcement, but he made very specific statements and I think in advertising, but I am not certain of this, in which he said things like what this

country needs is a strong defense and a willingness to pay for it in which he said specifically he had nothing to do with the telephone company breakup and he said things that I thought were patently untrue. Everything that I did was a specific reaction to that.

Q Did you have an attorney review this script before it was put on the air?

A I would be very surprised if we did. I am fairly certain we did not. We have an attorney for the party, but I doubt it.

[40] Q Was that the practice?

A I don't think so. We used an attorney more to help—

MR. KIRBY: Excuse me. Let's not talk about your practices in obtaining legal advice. I don't believe that is something that the Commission want to know about.

BY MR. KELLNER:

Q Was it your practice to seek legal review of statements or advertisements?

A I don't recall a time that we did.

Q How was this ad financed?

A It was paid for from the Federal Campaign Committee, the funds for which were collected through our finance department both from direct mail and from other direct givers. My recollection is that the vast majority if not really all of it, was from direct mail.

Very carefully we allowed no corporate funds—we carefully did not get into any federal limits. We assumed —in that federal campaign subcommittee we assumed that money must pass all the regular standards of federal campaign financing and we attempted to do that [41] and, as far as I know, we did that precisely.

Q Why was that important?

A I guess out of an abundance of caution whenever we felt anything might be in a federal campaign, involved in anything affecting the federal campaign we would do it. I suppose we could have done it out of the state

campaign committee. We did things out of the Federal Campaign Committee from time to time. Actually we had more money in the federal campaign than the state campaign. We had a U.S. congressman in a federal office. It was a double campaign.

If it had been the state legislature we probably would have used the state campaign committee.

MR. KELLNER: Off the record.

(Discussion off the record.)

BY MR. KELLNER:

Q I would like to follow up on things you mentioned earlier. You mentioned in addition to authorizing ads to react to statements by Tim Wirth you also held press conference or released statements. Can you tell us more about those?

A My recollection is I had over two or three press [42] conferences over a period of six or eight weeks when the candidate was not known for either the Democratic or Republican nomination for the U.S. Senate. And as I recall, I had one on defense which I think was in direct answer to an ad that he was running, that is my recollection, in which case I attempted to document in 30 or 40 votes specifically how he had been among the leaders of the antidefense group in the House, and to point out that he is trying to make himself into something that he is not and that is the purpose of that press conference.

I think after that, but I am not certain, but I think after that, by two weeks, there was a press conference in which I talked primarily about the breakup of AT&T because he was saying the breakup of AT&T was caused by the Justice Department and he had nothing to do with it and, after all, the president was President Reagan, and I said in the press conference I know who is president but I know who is chairman of the Oversight Committee who has to do with that, and I have the documents of the Oversight Committee.

And I had the documents. I brought the documents to the press conference as I recall from him as [43] chairman of the Oversight Committee to the Justice Department urging the breakup of the phone company, and I forgot whatever other evidence that I had, but there was a substantial amount of evidence that went to the fact he was in many cases the person most responsible for the breakup of AT&T which I felt he was and it was not responsible to say he had nothing to do with it. So those were the press conferences, either two or three of them.

Q Why did you hold them?

A That is the question of why did I run for chairman of the Republican Party? If I am chairman of the Republican Party I have an obligation to do that.

Q I am not familiar with how press conferences and press releases work. Would you read the statement in public? Can you teil me more about that?

A In Colorado the tradition of political press conferences is they are held in a state capitol in a room of the capitol where legislators and the governor can go and you get the political press to come and you announce and put notices on the board in the capitol and do a few other things and say you will hold a press conference at this time.

[44] My style was generally not to read the press release but to speak, to also take questions, and my recollection is I did not read anything but spoke. I am quite sure that I have documented the best that I could the allegations that I was making where he had distorted the record in my opinion.

Q Would you simultaneously issue a statement?

A Probably.

Q Were these press conferences recorded?

A Almost certainly by radio stations, television. I am not aware that I had any recording of it, or that I ever did.

Q So you don't have a recording of it?

A I am certain I don't.

Q Did you have any kind of prepared speech before you would hold a press conference?

A I would like to think I was very well prepared. I would not go to an important television and radio audience without being prepared, but my style was usually to speak from a note or two, or without notes, and probably to pass out a statement at the end of it. That is what I probably did.

[45] Q Who would write the press release?

A Essentially, I would. As far as I know, I wrote them all.

Q Would you have anybody review it?

A Probably I would have Doug Goodyear and/or Kay Riddle review it. And if there was any research, we may have had an intern look up the Congressional Record and have him check it that I would get the facts right on it.

Q Is there anyone else you would seek input from?

A I might seek input from the executive committee of the other officers, the vice chairman, the secretary of the party. These were all volunteers and they may be there one day and not be there the next.

There was no normal, formal, in the sense of a staffing done by the Defense Department, of checking off each staff. There is none of that what whatsoever. It was a kind of a thing who might be there that day, and financial contributors, we tried to keep informed. It made sense.

Q Are you familiar with the Federal Election Campaign Act?

A Reasonably. I am not an attorney but as a [46] layperson I consider myself reasonably familiar as a layperson with that Act.

Q Are you familiar with the limits on expenditures by a state party under section 441(a)(d)?

A I don't know about 441(a)(d) but I think I am familiar with what you are talking about.

Q Was it a practice for the state party while you were chairman to assign its expenditure limit under the Act?

A Yes.

Q Did that take place during the entire time you were chairman?

A I think so. There may have been a time when we spent our own limits but I think probably in every case we assigned it.

Q Was it the practice before you were chairman?

A As far as I know. I don't know.

Q Why was it assigned?

A We have such limited funds in the state and are always hunting for more money and if we could get support to our candidate without having to spend our money, that was preferable to us that by assigning—I don't know. [47] If we assigned it to any national committee and they put up the money, then we were better off than if we gave the same money out of our limited funds. We viewed the national funds as less limited than our funds. Maybe they didn't view it that way.

Q You used the term "limited funds." What did you mean?

A I already alluded to the fact one of the principal jobs I had was to raise money. You can almost judge the success of a party or the success of its chairman by how much money they raised. You are constantly, constantly, constantly working to raise money. That goes with the territory.

And no matter how hard you try, you wish you had another $10,000 here and $20,000 there, and there is always in every campaign you wish you had more money to do something with but you are limited by what you can raise. If you don't raise it, you don't have it and that is what I mean by limited, never having the funds to do the things that you want to do.

Q Whether—

A When I say "limited," it is limited by the [48] federal campaign funds. It is limited by law. You are limited to amounts in certain cases and limited to non-corporate so we are not only limited by our skill in raising money but also limited by limits placed by the federal government.

Q Is there anything else you would like to add to answers that you gave here today?

A I don't think so.

Q Have you given full and complete testimony here today?

A I think so. Yes.

MR. KELLNER: Counsel, do you have any questions for the witness?

MR. KIRBY: Yes, I have very few questions.

EXAMINATION

BY MR. KIRBY:

Q Mr. Callaway, the document that we have marked as Callaway Exhibit 1 was aired in April 1986. During the early part of 1986 was the committee engaged in fundraising activities in Colorado?

A Yes.

Q Based on your experience in political affairs [49] would you have expected Wirth Exhibit 1 to have any effect on the success of your fundraising efforts?

A Yes, I think so, but let me put it another way. If you got a political party that is not seen as aggressively doing its job in holding the other party accountable, and when I saw discrepancies in Tim Wirth's statement let me be sure that the large number of activists saw the same things and called me on the phone, and if the party was not responding to that, the fundraising would drop quickly.

You have to do things that people in your party approve of and to that extent it is part of what you do. You do what you have to do you raise money.

Q Based on your experience in politics, is the view that you just expressed unique to you or are there other politicians that would share that view?

A I would be amazed if there is any politician that would not share that view. It is fundamental that you raise money that the people you do things for see it as important.

Q You testified I believe that you were generally cautious that the Federal Election Act imposed a limit on [50] the spending of the party?

A Yes.

Q During the time you were chairman if there had been no federal spending limits were there things that the party would have spent on to support or oppose candidates for federal office?

A Yes. Yes. Yes. Incredibly. The kind of hoops you have to jump through as a party to stay legitimate and do the job, the kind of things you try to do is volunteer intensive and you come out—is it voluntary-intensive if the person carries the bag to the truck, is that volunteer-intensive? No.

It is a burden that is enormous to try to stay within the limit, within the law on the limit placed on federal candidates to the extent that many parties do not do it. They say they don't deal in federal elections because it is so confusing and difficult to comply with the law they just don't do it.

Q I am going to show you a clipping that appears at tab 13 to the Defendants' Statement of Undisputed Facts And Supporting Exhibits that has been submitted to the court, entitled "Dark Horse Challenges Representative [51] Wirth," by Peter Blake.

Does the name "Peter Blake" mean anything to you?

A Yes. He is well known.

Q Who is Mr. Blake?

A He is probably the leading political writer of the Rocky Mountain News that is the largest newspaper in

Colorado. He is well respected and he is not certainly a Republican. I don't know his registration, but he writes for both parties and is respected as being fair by both parties.

Q Is he considered to be honest?

A Yes.

Q If Mr. Blake reported a fact as a fact, would you be inclined to believe that he was telling the truth?

A Yes.

Q All right. I said "Mr. Blake."

A Pete Blake.

Q You commented Mr. Wirth, Congressman Wirth, was an incumbent Congressman in 1986; is that correct?

A That is correct.

Q Based on your experience in the political arena, [52] do incumbents have any advantages in seeking to gain reelection or to gain election to a higher office?

A The advantages are so enormous it is an absolute scandal. The amount of money incumbents get to promote themselves is such that reelection to the House in the last two elections your 98 percent. The reelection to our House—we have less turnover in the House of Lords in Britain, and the Congress, that is supposed to be close to the people, they get enormous amounts of staff which while they cannot get directly involved in a campaign, helps the campaign enormously and they get franked mail, that is a help, but they get postal patron frank mail. Every law is designed by incumbents to help incumbents, a lesser advantage if you go from the House to the Senate, but still a huge advantage.

MR. KIRBY: That is all I have. Thank you very much.

MR. KELLNER: Off the record.

(Recess.)

MR. KELLNER: On the record.

[53] EXAMINATION

BY MR. KELLNER:

Q I would like to ask you another question. Based on your testimony that you just gave, you mentioned some difficulties that you have in staying in compliance with the law. What did you mean?

A A political party is designed to do a lot of things. Among them is to help candidates and help candidates in the way, in their judgment, is the best way to help them. For federal candidates, which come under the FEC, there are rules that to the average nonlawyer state chairman are so complex and so difficult that many people just say I just won't play in that league. Giving examples, this is my recollection and this may not be the exact law, but it is my recollection, we can give all the bumper stickers to a candidate but cannot put a poster up. We can make it volunteer-intensive.

What does voluntary-intensive mean? Nobody knows. It probably means if you start and have it written by volunteers and printed by volunteers on their own press, that is probably good, but if you do less, where? There is no clear line.

[54] Every time you mail any piece of mail that is voluntary-intensive that a party can do under the laws, when I was there you always run the risk of being harassed, of having the opponent complain you violated the law, and defending yourself, and the whole gamut, what have you, is subject to federal laws that are seen to be extremely complex.

We, the Colorado party, put out a kind of thing on interpreting federal law because a lot of parties for other states were not as well organized as we were or did not pay as much attention or tend to forget whatever it was, but it is what you can do and can't do from a layman's standpoint instead of the legal viewpoint.

Because the committee gave you the legal viewpoint, a lot of people said that is all right for you but not for me. I will not play ball in federal races. A lot of states don't see the federal races as that important anyway.

Many states, Indiana being a prime state, would far rather elect a Secretary of State or Commissioner than a Congressman and they would say, "Look, it is tough enough anyway, we don't play in the federal game." That [55] is a shame. Parties should play in the federal game. Parties are designed to help those that should play in the game and the rules make it so complex it is very difficult.

Q Okay. I will ask you if there is anything you would like to add to the answers that you gave already?

A I don't think so.

MR. KELLNER: Okay. Then.

MR. KIRBY: Thank you very much.

MR. KELLNER: The deposition is concluded.

(Whereupon, at 3:05 p.m., the deposition was concluded.)

/s/ Howard H. Callaway
HOWARD H. CALLAWAY

[Certificate of Notary Public and Reporter
Omitted in Printing]

STATUTORY PROVISIONS

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) Dollar limits on expenditures by candidates for office of President of the United States

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000, in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) Increases on limits based on increases in price index

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(e) Certification and publication of estimated voting age population

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) Prohibited contributions and expenditures

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) Attribution of multi-State expenditures to candidate's expenditure limitation in each State

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Senatorial candidates

Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

(Pub. L. 92-225, title III, § 315, formerly § 320, as added Pub. L. 94-283, title I, § 112(2), May 11, 1976, 90 Stat. 486; renumbered Pub. L. 96-187, title I, § 105(5), Jan. 8, 1980, 93 Stat. 1354; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

§ 437f. Advisory opinions

(a) Requests by persons, candidates, or authorized committees; subject matter; time for response

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) Procedures applicable to initial proposal of rules or regulations, and advisory opinions

Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) Persons entitled to rely upon opinions; scope of protection for good faith reliance

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) Requests made public; submission of written comments by interested public

The Commission shall make public any request made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commis-

sion shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

(Pub. L. 92-225, title III, § 308, formerly § 313, as added Pub. L. 93-443, title II, § 208(a), Oct. 15, 1974, 88 Stat. 1283; renumbered § 312 and amended Pub. L. 94-283, title I, §§ 105, 108(a), May 11, 1976, 90 Stat. 481, 482; renumbered § 308 and amended Pub. L. 96-187, title I, §§ 105(4), 107(a), Jan. 8, 1980, 93 Stat. 1354, 1357; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

SUBCHAPTER I—DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 455 of this title.

§ 431. Definitions

When used in this Act:

(1) The term "election" means—

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual

shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

* * * *

§ 434. Reporting requirements

* * * *

(b) Contents of reports

Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated commitees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a (d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 441a(b) of this title;

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by

the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6)(A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such inde-

pendent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

* * * *

§ 437c. Federal Election Commission

* * * *

(c) Voting requirements; delegation of authorities

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

* * * *

§ 438. Administrative provisions

* * * *

(d) Rules, regulations, or forms; issuance, procedures applicable, etc.

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5)(A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regulation, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a committee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential

electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 791(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segre-

gated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incured thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(Pub. L. 92-225, title III, § 316, formerly § 321, as added Pub. L. 94-283, title I, § 112(2), May 11, 1976, 90 Stat. 490; renumbered and amended Pub. L. 96-187, title I, §§ 105(5), 112(d), Jan. 8, 1980, 93 Stat. 1354, 1366.)

REGULATORY PROVISIONS

11 C.F.R. CH. 1
(1995)

§ 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

(a)(1) The national committee of a political party may make expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any expenditure under this paragraph (a) shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under § 110.1 or § 110.2.

(4) The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.

(5) The national committee of a political party may not make independent expenditures (see part 109) in connection with the general election campaign of a candidate for President of the United States.

(6) Any expenditures made by the national, state and subordinate committees of a political party pursuant to 11 CFR 110.7(a) on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b)(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The expenditures shall not exceed—

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) Any expenditure under paragraph (b) shall be in addition to any contribution by a committee to the candidate permissible under § 110.1 or § 110.2.

(4) The party committees identified in (b)(1) shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.

(c) For limitation purposes, State committee includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations, the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

(2 U.S.C. 438(a)(8), 441a, 441d, 441e, 441f, 441g, 441h, 441i)

[41 FR 35948, Aug. 25, 1976, as amended at 45 FR 15119, Mar. 7, 1980; 45 FR 27435, Apr. 23, 1980; 45 FR 43387, June 27, 1980]

PART 109—INDEPENDENT EXPENDITURES
(2 U.S.C. 431(17), 434(c))

§ 109.1 Definitions (2 U.S.C. 431(17) (1980)).

* * * *

(b) For purposes of this definition—

* * * *

(2) *Expressly advocating* means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as *vote for, elect, support, cast your ballot for,* and *Smith for Congress,* or *vote against, defeat,* or *reject.*

(3) *Clearly identified candidate* means that the name of the candidate appears, a photograph or drawing of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

* * * *

FEDERAL ELECTION COMMISSION

July 6, 1995

11 CFR Parts 100, 106, 109, and 114

[Notice 1995-10]

Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures

AGENCY: Federal Election Commission.

ACTION: Final rule; Transmittal of regulations to Congress.

SUMMARY: The Commission is issuing revised regulations that define the term "express advocacy" and describe certain nonprofit corporations that are exempt from the prohibition on independent expenditures. The new rules implement portions of several decisions issued by the Federal courts in recent years. These rules were originally part of a larger rulemaking on the scope of permissible and prohibited corporate and labor organization expenditures. The Commission expects to complete the remaining portions of the original rulemaking by issuing additional revisions to the regulations at a later date.

* * * *

Section 100.17—Clearly Identified (2 U.S.C. 431(18))

The definitions of "clearly identified" in 11 CFR 106.1(d) and "clearly identified candidate" in 11 CFR 109.1(b)(3) have been removed and replaced by a revised definition in section 100.17. It is not necessary for this definition to appear in multiple locations throughout these regulations.

The NPRM sought comments on two alternative approaches regarding the requirement that the candidates be "clearly identified." Alternative A-1 indicated that this would include candidates of a clearly identified political party and a clearly identified group of candidates,

such as the "pro-life" candidates in the *MCFL* case. Alternative A-2 did not specifically mention clearly identified groups of candidates or candidates of clearly identified political parties.

Several commenters and witnesses argued that under Alternative A-1, it could be too difficult to determine the candidates in the group. Examples cited were buttons that read "Elect Women for a Change" or "Vote Pro-Choice," without more. The language was intended to apply to a situation, for example, where one insert in a mailing lists voting records or positions on specific issues and clearly indicates which of the named candidates shares the speaker's views. If another insert urges the reader to vote in favor of candidates who share its views, this is considered to be advocating the election of those clearly identified candidates. Similarly, the *MCFL* case involved a flyer which urged voters to vote for "pro-life" candidates, and included a list of "pro-life candidates." Thus, in this example, several "pro-life" candidates were clearly identified to the reader.

In light of comments, the wording of new section 100.22(a) has been reworked to refer to "one or more clearly identified candidate(s)" to more clearly state what was intended. In addition, section 100.17 has been modified to provide some additional examples of when candidates are considered to be "clearly identified."

Section 100.22 Expressly Advocating

The definition of express advocacy previously located in 11 CFR 109.1(b)(2) has been replaced with a revised definition in new section 100.22. The placement of the definition of express advocacy in Part 100—Scope and Definitions is intended to ensure that the reader will be able to locate it more easily. Also, while express advocacy is an important component of any independent expenditure, it is also the legal standard used in determining whether other types of activities are expenditures

by corporations or labor organizations under 11 CFR Part 114. Please not that the terms "communication containing express advocacy" and "communication expressly advocating the election or defeat of one or more clearly identified candidates" have the same meaning.

The NPRM presented the possibility of creating a separate definition of "express advocacy" for inclusion in Part 114 that would apply only to corporations and labor organizations governed by that Part. The NPRM indicated that the purpose of promulgating a separate definition would be to focus more specifically on implementing the *MCFL* Court's dictate that "express advocacy" is the standard when determining what is an expenditure under 2 U.S.C. § 441b. The Notice suggested that a separate definition could center on whether a communication urged action with respect to a federal election rather than on whether the communication also related to a clearly identified candidate. Thus, this approach would have taken a different view of "express advocacy" for organizations subject to the prohibitions of section 441b.

There was little support for separate definitions from the comments and testimony. The difficulty the commenters and witnesses had in trying to determine what the courts meant by "express advocacy," and what they thought the Commission had in mind, amply demonstrate that it would be extremely confusing to work with separate definitions for corporations and labor organizations on one hand, and candidates, committees and individuals on the other. Consequently, separate definitions of express advocacy have not been included in the final rules.

1. *Alternative Definitions Presented in the NPRM*

The NPRM sought comments on two alternative sets of revisions to the definition of express advocacy. Alternatives A-1 and A-2 were similar in several respects. They both continued to list the specific phrases set forth in the *Buckley* opinion as examples of express advocacy.

Both alternatives recognized that all statements and expressions included in a communication must be evaluated in terms of pertinent external factors such as the context and timing of the communication. In addition, both proposed definitions clearly indicated that communications consisting of several pieces of paper will be read together.

The alternative definitions in the NPRM differed in several respects. Under Alternative A-1, express advocacy included suggestions to take actions to affect the result of an election, such as to contribute or to participate in campaign activity. In contrast, Alternative A-2 indicated that express advocacy constitutes an exhortation to support or oppose a clearly identified candidate, and that there must be no other reasonable interpretation of the exhortation other than encouraging the candidate's election or defeat, rather than another type of action on a specific issue. Nevertheless, Alternative A-2 also specifically stated that "with respect to an election" includes references such as "Smith '92" or "Jones is the One."

There was no consensus among the commenters and witnesses regarding either alternative definition of express advocacy. While there was more support for Alternative A-2 than A-1, specific portions of both alternatives troubled a number of commenters and witnesses. Some objected that Alternative A-1 was too narrow in that it did not cover all express, implied, or reasonably understood references to an upcoming election. Others argued Alternative A-1 was too broad, and preferred Alternative A-2. However, there was also considerable sentiment expressed that Alternative A-2 was also too broad, and should be further limited to avoid running afoul of the First Amendment considerations that are involved.

To illustrate the difficulty involved in applying an "express advocacy" standard, the Commission included Agenda Document #92-86-A in the rulemaking record. This document contained seven hypothetical advertisements, each of which is assumed to be published within

two weeks of an election. Several written comments and witnesses mentioned these examples in analyzing the proposals contained in this Notice, but there was no consensus as to which examples, if any, contained express advocacy.

In commenting on the proposed rules, the Internal Revenue Service indicated that 26 U.S.C. § 501(c)(3) prohibits certain nonprofit organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for elective public office. The IRS stated that prohibited political activity under the Internal Revenue Code is much broader in scope than the express advocacy standard under the FECA. The Commission expresses no opinion as to any tax ramifications of activities conducted by nonprofit corporations, since these questions are outside its jurisdiction.

The definition of express advocacy included in new section 100.22 includes elements from each definition, as well as the language in the *Buckley*, *MCFL* and *Furgatch* opinions emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate. Please note that exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy. The expressions enumerated in *Buckley* included "support," a term that encompasses a variety of activities beyond voting.

2. *Examples of Phrases That Expressly Advocate*

The previous definition of express advocacy in 11 CFR 109.1(b)(2) included a list of expressions set forth in *Buckley*. Both alternatives in the NPRM would have largely retained this list of phrases that constitute express advocacy. The revised definition in 11 CFR 100.22(a) includes a somewhat fuller list of examples. The expressions enumerated in *Buckley*, such as "vote for," "Smith

for Congress," and "defeat" have no other reasonable meaning than to urge the election or defeat of clearly identified candidates.

3. *Communications Lacking Such Phrases*

The NPRM also addressed communications that contain no specific call to take action on any issue or to vote for a candidate, but which do discuss a candidate's character, qualifications, or accomplishments, and which are made in-close proximity to an election. An example is a newspaper or television advertisement which simply states that the candidate has been caring, fighting and winning for his or her constituents. Another example is a case in which a candidate is criticized for missing many votes, or for specific acts of misfeasance or malfeasance while in office.

Under Alternative A-2, these types of communications would have constituted exhortations if made within a specified number of days before an election, and if they did not encourage any type of action on any specific issue, such as, for example, supporting pro-life or pro-choice legislation. Comments were requested as to what an appropriate time frame should be—as short as 14 days, or as long as six months, prior to an election, or some other time period considered reasonable.

Some commenters opposed treating these communications as express advocacy on the grounds that there is not a clear call to action. Others argued that such communications, particularly when made by a candidate's campaign committee, were clearly intended to persuade the listener or reader to vote for the candidate.

Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate

in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis.

4. *Communications Containing Both Issue Advocacy and Electoral Advocacy*

The final rules, like the proposed rules, treat communications that include express electoral advocacy as express advocacy, despite the fact that the communications happen to include issue advocacy, as well. Several comments pointed out that the legislative process continues during election periods, and argued that if a legislative issue becomes a campaign issue, the imposition of unduly burdensome requirements on those groups seeking to continue their legislative efforts and communicate with their suppoters is unconstitutional. These concerns are misplaced, however, because the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages. As noted in *Buckley*, the FECA applies only to candidate elections. See, e.g., 424 U.S. at 42-44, 80. For example, the rules do not preclude a message made in close proximity to a Presidential election that only asked the audience to call the President and urge him to veto a particular bill that has just been passed, if the message did not refer to the upcoming election or encourage election-related actions. In contrast, under these rules, it is express advocacy if the communications described above urged the audience to vote against the President if the President does not veto the bill in question.

Nevertheless, to alleviate the commenters' concerns, the definition of express advocacy in new section 100.22(b) has been revised to incorporate more of the *Furgatch* interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable

minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.

Both alternative definitions of express advocacy included consideration of the context and timing of the communication, and indicated that communications consisting of several pieces of paper will be read together. Several commenters and witnesses were troubled by the perceived vagueness and uncertainty inherent in the use of the phrases "taken as a whole," "in light of the circumstances under which they were made," and "with limited reference to external events." They argued that they would not be able to ascertain in advance which facts and circumstances would be considered by the Commission. Some of the commenters and witnesses acknowledged the difficulty of crafting a clear and precise standard in the First Amendment context.

The final rules in section 100.22 retain the requirement that the communication be read "as a whole and with limited reference to external events" because *MCFL* makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. *See* 479 U.S. at 249-50. Further, the *Furgatch* opinion evaluated the contents of the communication in question "as a whole, and with limited reference to external events." 807 F.2d at 864. The external events of significance in *Furgatch* included the existence of an upcoming presidential election and the timing of the advertisement a week before the general election. However, please note that the subjective intent of the speaker is not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable interpretation of the message. *Furgatch*, 807 F.2d at 864-65.

5. *"Vote Democratic" or "Vote Republican"*

In the NPRM, Alternative A-2 treated as express advocacy messages such as "Vote Republican" or "Vote

Democratic" if made within a specified period prior to a special or general election or an open primary. Again, comments were sought on time periods ranging from 14 days to 6 months prior to an election, or any other time period considered reasonable. Alternatively, the period between the primary and general elections was suggested as the time when such messages refer to clearly identified candidates. In contrast, Alternative A-1 treated these phrases as express advocacy if made at any time after specific individuals have become Republican or Democratic candidates within the meaning of the FECA in the geographic area in which the communication is made. The NPRM also sought comments on when a message such as "Vote Democratic" or "Vote Republican" refers to one or more clearly identified candidates, rather than being just a message of support for a party.

The views of the commenters and witnesses reflected little consensus regarding these messages. Several were supportive of Alternative A-2, and suggested that a 90 day time frame would be appropriate. Others felt that such messages are always express advocacy because they aim at influencing the outcome of elections. Conversely, some commenters argued that these messages cannot be express advocacy if there are no declared candidates yet running for the party's nomination or if the nominee of the party has not yet been selected.

Section 100.22 of the final rules does not specify a time frame or triggering event that will cause these messages to be considered express advocacy. Instead, messages such as "Vote Democratic" or "Vote Republican" will be evaluated on a case-by-case basis to determine whether they constitute express advocacy under the criteria set out in 11 CFR 100.22(b).

* * * *

§ 100.17 Clearly identified (2 U.S.C. 431(18)).

The term *clearly identified* means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an

unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

3. 11 CFR Part 100 is amended by adding section 100.22 to read as follows:

§ 100.22 Expressly advocating (2 U.S.C. 431(17)).

Expressly advocating means any communication that—
(a) Uses phrases such as "vote for the President," "reelect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Regan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

* * * *

FEC ADVISORY OPINIONS 1978-46

[Reproduced from CCH, Federal Election Campaign Financing Guide]

[¶ 5348] *AO 1978-46: Corporate Support for Party Convention*

[*Corporate contributions via advertisements or the purchase of exhibit space at a party convention, as well as advertisements in a party newsletter, are allowed only if apportionable to state and local candidates as opposed to federal candidates. Answer to Wayne J. Thorburn, Executive Director, Republican Party of Texas, 1011 Congress Avenue, Suite 520, Austin, Texas 78701.*]

This letter is in response to yours dated July 14, 1978, concerning the 1978 Republican State Convention of Texas and the party newspaper published by the Republican Party of Texas. Specifically, you ask whether Federal statutes, regulations or FEC Advisory Opinions exist which would limit:

(1) solicitation of corporate advertisements in a printed program for the 1978 Republican State Convention of Texas;

(2) sale of exhibit space by the convention to corporations;

(3) advertising by corporations in the Party's monthly newspaper.

The Federal statute relevant to your questions is 2 U.S.C. § 441b. This provision of the Federal Election Campaign Act of 1971, as amended prohibits:

(1) Contributions or expenditures by national banks and Federally chartered corporations in connection with any election to Federal, State, or local political office, and

(2) Contributions or expenditures by any corporation in connection with any Federal election or "in connection with any primary election or political convention or caucus held to select

candidates for" the offices of President, Vice-President, Senator, and Representative in Congress, and

(3) Knowing acceptance of such contributions by any candidate, political committee or other person.

Therefore, to the extent the Republican State Convention of Texas is for the purpose of influencing or "in connection with" a Federal election and funds paid by corporations for advertising or exhibit space are used to defray expenses of the convention, those funds would be corporate contributions or expenditures that are prohibited under § 441b(a) as outlined above. Similarly, the Party newsletter could not be financed with proceeds from corporate ads to the extent its purpose is to influence Federal election or it is connected with a Federal election.

Nominations of Federal office candidates by the Texas Republican Party were required under Texas law to be made by primary election (held on May 6, 1978) rather than Party convention. However the Republican State Convention of Texas, may still be deemed to be, at least in part, for the purpose of influencing or "in connection with" a Federal election. Texas law provides that State conventions be held "between the first and third Tuesdays, exclusive, in September." Tex. Elec. Code, art. 13.35. The duties of the State convention are outlined in Texas law and primarily relate to candidates for State offices. The convention also announces "a platform of principles" and elects officers and members for the State executive committee of the Party. See Tex. Elec. Code, arts. 13.37, 13.38. The Texas statute does not preclude the State Convention from activities involving communications influencing the election of candidates to Federal office or otherwise connected with a Federal election. Therefore, if the State Convention provides a forum for candidates for Federal office which involves (1) the solicitation, making or acceptance of contributions to a campaign for

Federal office, or (2) any communication expressly advocating the election or defeat of a clearly identified candidate for Federal office, the Convention would be regarded as for the purpose of influencing and in connection with a Federal election. The prohibitions of 2 U.S.C. § 441b would bar the financing of all Convention expenses with corporate treasury funds, but such funds could be used (assuming it is proper under Texas law) to defray Convention expenses that are not allocable to Federal election purposes.

In concluding that some expenses of the Convention may be allocable as influencing Federal elections, the Commission would not require that such allocable amount be further allocated to specific candidates for Federal office. Specific Federal candidate allocation would only be necessary where a Convention expenditure was made on behalf of a clearly identified candidate for Federal office to whom it could be directly attributed. See § 106.1 of Commission regulations. If the Convention has any relationship to Federal elections, as discussed above, the expenses allocable to Federal election purposes must be paid from the Texas Republican Party's Federal campaign committee established pursuant to § 102.6(a) of Commission regulations. The amount of expenditures allocable to the Federal campaign committee may be determined by using the formula set forth in § 106.1(e) of Commission regulations. Other allocation formulas are explained in the Commission's response to Advisory Opinion Request 1976-72 and in a guideline published in the *FEC Record* of December 1977. (Copies are enclosed.)

If the State Convention is related only to State elections and does not involve any activities bearing on Federal elections as discussed above, expenses of the Convention would not be expenditures under the Act. Therefore, they would not have to be reported (assuming they are paid by a non-registered party organization); nor would the pro-

hibitions of 2 U.S.C. § 441b apply except as to contributions by national banks and corporations organized by authority of a law of Congress. (See also 2 U.S.C. § 441e which bars contributions by foreign nationals in connection with an election to any political office.)

Regarding the acceptance of corporate funds for advertisements placed in a monthly party newsletter of the Texas Republican Party, the Commission concludes that under the Act such funds would be contributions. However, if proper under Texas law, proceeds from corporate ads could be accepted by the Party and used for State or local election purposes.* The expenses of preparing, publishing, and distributing the newsletter would be regarded as Federal election-related if communications carried in the newsletter are for the purpose of influencing the election of any person to Federal office. Thus if any material published in the newsletter relates to Federal elections, expenses incurred for the newsletter need to be paid, on an allocated basis, from the Federal campaign committee of the Texas Republican Party. The formulas mentioned above may be used to compute the allocable amount. In addition, an allocation based upon the column inches (or space) devoted to Federal candidates as a class, without express advocacy of specific Federal candidates, may be used to determine the amount of expenses required to be paid and reported by the Federal campaign committee of the Party.

However, if the newsletter includes communications expressly advocating the election or defeat of a clearly identified candidate for Federal office, the expenses of the newsletter attributed to those communications (to be determined by an allocation formula based on columns or amount of space utilized for the communication in relation to the entire newsletter) must be treated as a general election expenditure of the Party under 2 U.S.C. § 441a(d). It must be paid from funds of, and reported by, the Federal campaign committee pursuant to § 110.7 of Commission regulations. See also § 104.2(b). This conclusion follows from Commission regulations on allocation which require that expenditures for "general administrative . . . and other day-to-day costs of political committees" have to be attributed to individual candidates for Federal office when they are "on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate." 11 CFR 106.1(c).

* It appears that Texas Election Code, arts. 14.01(D), (E), 14.06, and 15.17 may be relevant.

On the other hand, if the Party's newsletter is completely devoid of both general and specific communications relating to candidates for Federal office, the expenses of preparing, publishing and distributing it would not involve contributions or expenditures under the Act and Commission regulations.

Those portions of this opinion relating to the Party's newsletter supercede and modify, in part, the Commission's responses to Advisory Opinion Request 1976-65, issued September 21, 1976.

This response constitutes an advisory opinion concerning the application of a general rule of law stated in the Act, or prescribed as a Commission regulation, to the specific factual situation set forth is your request. See 2 U.S.C. § 437f.

Dated: September 5, 1978.

DISSENTING OPINION OF COMMSSIONER HARRIS, AO 1978-46

I dissent from this opinion for the reasons outlined in my dissent to Advisory Opinion 1978-10.

I do not share the majority's view that "allocation" is the panacean solution to the difficult problems created under our Act by state party spending for mixed state/federal purposes. Nor do I agree that expenditures allocated to non-federal purposes may be paid out of "restricted" corporate and union treasury funds.

As I have argued previously, the allocation formulas on which the Commission rests its action today inevitably result in the attribution of all corporation and labor treasury contributions to state elections and all "unrestricted" individual and committee contributions to federal elections. Allocation thus "is of bookkeeping significance only rather than a matter of real substance." *Abood v. Detroit Board of Education*, 431 U.S. 209, 237, n. 35 (1976) *citing Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).

The reality is that this mechanism provides a means by which corporations and unions can foot the bill for the greater part of a state party's administrative and operating expenses. By paying a larger share of these costs, corporations and unions subsidize the party's federal activities. Such subsidy is, in my opinion, a contribution in connection with federal elections in violation of 2 U.S.C. 441b.

Once again the Commission is thwarting the design of Congress to lessen the influence of corporate and union money in federal elections.

Dated: September 5, 1978.

FEC ADVISORY OPINION 1984-15

[Reproduced from CCH, Federal Election Campaign Financing Guide]

[¶ 5766] *AO 1984-15: Reporting Expenditures for Anti-Democratic Television Ads*

[If the Republican Party pays for a series of television ads denigrating the potential Democratic presdential candidates, the expenditures would be considered coordinated expenditures unless the Republican candidate chooses not to accept federal funds, in which case they would be contributions. Answer to E. Mark Braden, Republican National Committee, Dwight D. Eisenhower Republican Center, 310 First Street, S. E., Washington, D. C. 20003.]

This responds to your letter of April 2, 1984, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to disbursements by the Republican National Committee for a proposed national television advertising program.

You state that the Republican National Committee [1] intends to undertake a national television advertising program. In your request you included two proposed scripts for the television advertisements. In a script on the subject of the Federal budget deficit, the video opens with the U.S. Capitol and fades to an image of one of the current Democratic presidential candidates. The audio portion begins with the candidate's comments about the deficit. An announcer then interjects: "That's what you said. But look what you've done . . . ." An animated graph then depicts a rise in deficits during the candidate's tenure in Congress. The advertising concludes with the statement: "Act today to preserve tomorrow. Vote Republican."

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[1] The Republican National Committee ("RNC") is a qualified, multi-candidate political committee and the national committee of the Republican Party. See 2 U.S.C. § 431(4), § 431(14), and § 441a(a)(4).

In the second script, the video opens with a portrait of a current candidate for the Democratic presidential nomination with the camera slowly zooming in on the portrait and then holding the image. The audio portion identifies the candidate by name and states that he "said he'd bring new ideas and morality to government. But look at the list of the new ideas." The audio continues with a "long list of inconsistencies of the candidate" and sums up with these questions: "This is moral leadership? These are new ideas?" Both the video and the audio conclude with the statement: "Vote Republican."

You state that the Republican National Committee intends to produce and air this advertising program prior to and after the nomination of a Democratic candidate for President. You request an opinion concerning the treatment of the disbursements by the Republican National Committee for the production and placement of general electronic media advertisements using these or similar scripts. Your request specifically raises five questions:

(1) how should disbursements by the Republican National Committee for its proposed national television program be reported to the Commission?

(2) would these disbursements count against the expenditure limitations of 2 U.S.C. § 441a(d)?

(3) is the characterization of these disbursements affected by the timing of the broadcast of these advertisements either before or after the Democratic presidential nomination?

(4) would the characterization of these disbursements be affected by an express statement of the purpose of the advertisements as letting a particular Democratic candidate's own words be used against him?

(5) would the characterization of these disbursements be affected by a statement of the advertisement's purpose as the defeat of the Democratic Party's candidates generally without identifying as a purpose the defeat of any specific candidate?

To facilitate a proper analysis, these questions are answered in a slightly altered sequence.

Because these contemplated expenditures would relate to an election for Federal office, they would be governed by the Act, and thus reportable. Under the Act, a national party committee may report disbursements in one of eight categories. See 2 U.S.C. § 434(b)(4); 11 CFR 104.3(b)(1), and FEC Form 3X.[8] Four reporting categories—transfers to affiliated committees, loans, loan repayments, offsets—are clearly not applicable to your request. The "operating expenditures" category includes disbursements for such expenses as polling, travel, phone banks, catering, media, rent, personnel, overhead, fundraising, training seminars, registration and get-out-the-vote drives, and other day-to-day costs that are not made on behalf of a clearly identified candidate and cannot be directly attributable to that candidate. See 11 CFR 104.3(b)(3)(i), 106.1(c), and 110.8(e). The amount of these expenditures is not subject to any limitations. See Advisory Opinion 1975-87 [¶ 5178]. The Commission concludes, however, that expenditures for the television advertisements proposed in this request are not, with one possible exception, the type of expenditures that are properly reportable as "operating expenditures."

The remaining reporting categories are contributions to political committees, coordinated party expenditures, and other disbursements. The reporting category for contribution to political committees includes disbursements to a candidate and his or her authorized campaign committees. See 11 CFR 104.3(b)(3)(v). This category also covers in-kind contributions. 11 CFR 100.7(a)(1)(iii). For a

[8] Also, a national party committee is incapable of making independent expenditures. *See* Advisory Opinion 1980-119 [¶ 5472].

multicandidate political committee, a $5,000 limitation applies to contributions to a candidate and his or her authorized campaign committees with respect to any election for Federal office. 2 U.S.C. § 441a(a)(2); 11 CFR 110.2(a)(1). Coordinated party expenditures are expenditures by the national committee of a political party in connection with the general election campaign of any candidate for President of the United States who is affiliated with that party. 2 U.S.C. § 441a(d)(2). The amount of these expenditures is subject to a specific dollar limitation. *Id.* The "other disbursements" category covers disbursements not otherwise reportable under the other categories. 11 CFR 104.3(b)(3)(ix). No dollar limitation applies to these disbursements.[3]

The threshold question concerns whether the timing of the broadcast of the RNC's proposed television advertisements, either before or after the Democratic presidential nomination, would affect the characterization of RNC expenditures for these advertisements: either as contributions to a candidate or as coordinated party expenditures. Although timing is relevant, the Commission does not view the timing of the broadcasts as controlling how expenditures for the advertisements should be treated for limitation and reporting purposes. First, with regard to viewing the expenditures as contributions to a candidate, Commission regulations contemplate that contributions may be received with respect to the general election before the date of the primary election or nomination. See 11 CFR 102.9(a). Second, the Commission notes that nothing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election.

[3] To the extent that disbursements for the proposed television advertisement relate to any election for Federal office, they cannot be made with funds from prohibited sources. See Advisory Opinions 1978-46 [¶ 5348] and 1978-10 [¶ 5340]. See also Advisory Opinion 1982-5 [¶ 5659].

The Act refers to expenditures "in connection with the general election campaign. . . ." Where a candidate appears assured of a party's presidential nomination, the general election campaign, at least from the political party's perspective, may begin prior to the formal nomination. Thus, national party expenditures in connection with that campaign are possible. Furthermore, because the national party committee rather than the candidate or his principal campaign committee makes these expenditures, whether a specific nominee has been chosen, or a candidate assured of nomination, at the time the expenditures are made, is immaterial.[4] Although consultation or coordination with the candidate is permissible, it is not required. See Advisory Opinion 1975-120 [¶ 5186]. The act gives a national party committee only one coordinated party expenditure limit with respect to the presidential general election campaign.[5] To permit expenditures made prior to nomination but with the purpose and effect of influencing the outcome of the presidential general elec-

[4] Significantly, § 441a(d) does not by its terms refer to candidates for Federal office as the party's nominee; it refers to such candidates only as those who are "affiliated with" the political party. By contrast, in other contexts where Congress was concerned with the status of Federal office candidates as regards political party activity, it has explicitly referred to "nominees of" the political party. See 2 U.S.C. §§ 431(8)(B)(x), (8)(B)(xii), (9)(B)(viii), and (9)(B)(ix), which exempt certain State and local committee activities "on behalf of nominees of" the party from limitation as a contribution or party expenditure. Also, see 2 U.S.C. § 432(e)(3)(A) which refers to the presidential candidate "nominated" by a political party, and 2 U.S.C. § 441a(a)(7), § 441a(b)(2) which both refer to the candidate of a political party "for election" to the office of President.

[5] This provision sets a single limitation for coordinated party expenditures for President at the national level. Therefore, if disbursements for these proposed advertisements were made by the national senatorial or congressional campaign committees, such disbursements would be allocable to the single expenditure limitation of 2 U.S.C. § 441a(d)(2). *See generally* Advisory Opinions 1980-119 and 1976-108 [¶ 5236].

tion to escape this limitation would be inconsistent with the purpose and intent of 2 U.S.C. § 441a(d). *See generally* Advisory Opinion 1975-72 [¶ 5152]. Therefore, the proper analytical focus is whether the expenditures for the television advertisements proposed in this request are made for the purpose of influencing the outcome of the general election for President of the United States. See 2 U.S.C. § 431(8)(A)(i), § 431(9)(A)(i), and § 441a(d)(2). There is no question that expenditures for these advertisements after the nominating conventions would be expenditures in connection with the presidential general election campaign.[6] This responds to question three.

In your request, you state that the proposed television advertisements will show the image or portrait of one of the current Democratic presidential candidates. They will quote statements by that candidate about the budget deficit or government morality and depict his record relating to those statements. Each advertisement concludes with a visual and audio appeal to "Vote Republican." These advertisements will be broadcast to the general public. The proposed advertisements will prominently display visual images of a current candidate for the Democratic Party's presidential nomination and will emphasize verbal statements by or about such candidate. The advertisements will question or challenge the candidate's statements, position, or record. They will conclude with a partisan statement to "Vote Republican." The clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and

[6] Although not explicitly stated in your request, the Commission assumes that such advertisements would feature the Presidential nominee of the Democratic Party.

any Democratic Party nominee in such a way as to favor the choice of the Republican candidate. The only election which will pose such a choice is the presidential general election. These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.[7]

As such, these expenditures are only reportable either as contributions or as coordinated party expenditures. Thus, the Republican National Committee could report expenditures for these advertisements, up to a maximum of $5,000, as an in-kind contribution to the Republican presidential candidate with respect to the 1984 general election. However, if the Republican presidential candidate in the 1984 general election chooses to accept public funding pursuant to 26 U.S.C. § 9001 *et seq.*, he may not accept contributions, except for certain limited exceptions that are not applicable here. See 26 U.S.C. § 9003(b)(2); 11 CFR 9003.2(a)(2). Accordingly, in such circumstances the Republican National Committee could not report expenditures for these advertisements as an in-kind contribution to the Republican presidential candidate. Instead, it could then only report these expenditures as coordinated party expenditures pursuant to 2 U.S.C. § 441a(d)(2) on Schedule F of FEC Form 3X. *See generally* Advisory Opinions 1978-89 [¶ 5384] and 1978-46. This responds to questions one and two.

[7] The addition of a statement of purpose as described in question four reinforces the characterization of these advertisements as relating to the presidential general election. This footnote responds to question four.

Your fifth question does not state whether the proposed advertisement would refer to all Democratic presidential candidates without identifying any specific candidate or to all Democratic candidates for all Federal offices without identifying any specific candidate or office. If the reference is to all Democratic presidential candidates generally, the characterization of the advertisements and the reporting requirements for the disbursements would remain unchanged from that set forth above. If, however, the reference is to all Democratic candidates generally without identifying (by visual image or audio content) any specific candidate or office, the disbursements would not then be attributable to any candidate or to any campaign for any particular Federal office. Instead, they would be characterized as advertisements promoting the Republican Party over the Democratic Party and to encourage voters to support the Republican Party generally. As such, the disbursements for such advertising would not be reportable as contributions to any specific candidate or as coordinated party expenditures in connection with any specific general election campaign for President, Senator, or Representative. See Advisory Opinions 1978-46 and 1975-87. Such disbursements would be reportable as operating expenditures of the Republican National Committee that are generally related to Federal elections although not on behalf of any clearly identified candidate for Federal office, nor directly attributable to such a candidate. See 11 CFR 104.3(b)(3)(i) and 106.1(c).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activities set forth in your request. See 2 U.S.C. § 437f.

Dated: May 31, 1984.

P.S. Commissioners Aikens and Elliott voted against approval of this opinion and will file dissenting opinions at a later date.

FEC ADVISORY OPINION 1985-14

[Reproduced from CCH, Federal Election Campaign Financing Guide]

[¶ 5819] *AO 1985-14: Attribution of Congressional Campaign Committee Expenditures*

[*A campaign involving radio and television ads and direct mailings by a congressional campaign committee would not be subject to limitations where a specific opposition candidate was not named or where one was named but there was no encouragement to vote for the committee's candidate. However, a mailing in a specific opposition candidate's district would be subject to limitation. Answer to Robert F. Bauer of Parkin, Coie, Stone, Olsen & Williams, 1110 Vermont Avenue, N.W., Washington D.C. 20005.*]

This responds to your letters of March 18 and April 9, 1985, requesting an advisory opinion on behalf of the Democratic Congressional Campaign Committee ("DCCC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation and reporting of expenditures for certain political advertisements.

DCCC is registered with the Commission as a party-related, multicandidate political committee. You state that DCCC is "[o]rganized and operated by Democratic members of the House of Representatives" and "functions broadly as a national party organization in support of Democratic candidates to the House, as well as other public offices around the country." You state that DCCC plans to initiate a program involving criticism of the records of individual Republican members of the House of Representatives and of the activities of Republican Members of Congress as a class. Some of these Republican members may not be announced candidates for the 1986 elections, while some will have qualified as candidates pursuant to the Act. See 2 U.S.C. § 431(2).

You state that DCCC plans to focus its program in 20-100 selected congressional districts but may expand

it to include all districts represented by Republicans. You add that DCCC's program will have "the clear purpose of influencing voter perceptions of these candidates with a view toward weakening their positions as candidates for re-election in 1986." You state that some of the proposed communications will refer to the next or the last election, while other communications will criticize a congresman's record without any reference to any election or without any express advocacy language. These communications will include television and radio broadcasts, newspaper and other print advertising, and direct mail brochures. You propose to produce and disseminate these communications currently and in September 1985.[1]

In this context, you have provided the scripts for radio and television broadcasts and the text for a direct mail brochure:

"PLIERS AND TOILET SEATS" (Radio/TV)

Democratic Congressional Campaign Committee

Background: Loud laughter and applause

Voice No. 1: What's going on? Wha—so funny?

Voice No. 2: (laughing intermittently): Oh, that's the President getting a good laugh from the crowd in Washington, the Republicans in Congress. He says we should take care of the farm crisis by keeping the grain (begins to burst into uncontrolled laughter)—and exporting the farmers!!!

Voice No. 1: (with anger): That's not funny at all; this farm crisis is real and endangering the very existence of family farms. People are really suffering.

[1] Your request indicates a schedule of April and September 1985, but you also note that this proposed schedule as to April will be adjusted depending on the timing of the Commission's response to your request.

Voice No. 1: Who cares? The Republicans sure don't. So just join the crowd and have a good laugh.

Announcer: But it is not a laughing matter. The President and his Republican supporters in Congress are enjoying this joke at the expense of the American farmer —but the last laugh is on you and on your children. And while the Republicans are breaking every election-year promise they ever made to the American farmer, they just look on and smile when multi-billion dollar defense contractors charge you—the taxpayer—$——— for a pair of pliers and $——— for a toilet seat. That's the real joke.

(Pause)

Announcer: Let your Republican Congressman know that you don't think this is funny.

(Or, in some ads: Let the Republicans in Congress know what you think about their sense of humor.)

[In some scripts, the text closes with "Vote Democratic"]

"Crumbling Foundation" (Radio/TV)

Democratic Congressional Campaign Committee

Sound: A crumbling, cracking sound of something "giving away."

Announcer (with sound in background): You read the newspaper nowadays and what do you find: stories about collapsing banks, people in a panic over the loss of their savings, federal and state government coming up with rescue plans and bailouts.

(Sound in background increases in volume)

Announcer: The President and his Republican allies in Congress are all smiles, they tell us not to worry. But under their leadership, the budget deficit grows to

monstrous proportions, Wall Street is nervous, the dollar begins to show signs of weakness.

(Sound comes to fore, very loud and then replaced by a moment of silence)

Announcer: We've seen all this before: let's make sure it doesn't happen again. Let your Republican Congressman (or in some ads, the Republicans in Congress) know that their irresponsible management of the nation's economy must end—before it's too late.

[In some scripts, the text closes with "Vote Democratic"]

SAMPLE MAILER

17 x 22/One Fold

Front Face
8½ x 11

Bulk mail

Wave of the future?

[dye-cut; beautiful sunset; couple walking in ocean surf/beach]

Fold

Inside
17 x 22

The wave of the future could be an oil spill if Cong. X has his way!

[Picture of giant oil-derrick in ocean ruins the lovely picture]

Text

List of X's contributions from oil industry

[Same couple on beach]

Back Cover
8½ x 11

Don't be fooled by Republican rhetoric. Save our coastal environment.

Let Congressman X know how you feel.

[In some scripts, the text closes with "Vote-Democratic".]

You seek to determine whether DCCC's expenditures for these planned communications must be considered attributable contributions or expenditures under 11 CFR 106.1 and Advisory Opinion 1984-15 [¶ 5766]. You have presented several specific questions:

1. Would broadcast advertisements and other general public communications (e.g. direct mail, leaflets, etc.) that specifically identify Republican congressmen and criticize their records, require allocation under 11 CFR 106.1(a) and AO 1984-15? Does the answer depend on whether the communications contain reference to "elections" or any "express advocacy" language?

2. Would broadcast advertisements and other general public communications that criticize the activities and record of Republican congressmen as a class require allocation under 11 CFR 106.1(a) and AO 1984-15 to the individual Democratic candidates, when ultimately nominated by the Democratic Party?

3. Does the answer to question 2 differ if DCCC directs these "generic" critiques to selected congressional districts?

DCCC's payments for these communications are reportable expenditures for the purpose of influencing Federal elections, and the sources of the funds used by DCCC to make these expenditures are subject to the limitations

and prohibitions of the Act. See 2 U.S.C. § 434, § 441a, § 441b, § 441c, § 441e, and § 441f. Your questions relate to whether these expenditures are attributable to a specific candidate or candidates and, thus, subject to the Act's limitations on those contributions or expenditures made by DCCC.

You state that there may be no Democratic candidate, either announced or qualified under the Act, in the congressional districts selected to receive DCCC's expenditures for these communications will not be made in cooperation or consultation with any candidate.[3] Instead, the Commission views your request as limited to the situation where expenditures for these communications are made without any consultation or cooperation, or any request or suggestion of, candidates seeking election to the House of Representatives in the selected districts.

In this context, the Act's limitations at 2 U.S.C. § 441a (d) become relevant since the Commission has stated that expenditures pursuant to 2 U.S.C. § 441a(d) may be made without consultation or coordination with any candidate and may be made before the party's general election candidates are nominated. See Advisory Opinion 1984-15.[3] This section permits "the national committee of a political party" to make additional expenditures, subject to ceertain specific dollar limitations, "in connection with the general election campaign of a candidate for" the House of Representatives "who is affiliated with such party." 2 U.S.C. § 441a(d)(3).[4] A

[3] See 2 U.S.C. § 441a(a)(7)(B)(i); 11 CFR 104.3(b) and 104.13(a).

[3] This interpretation is consistent with the reporting requirements. Expenditures made under § 441a(d) and 11 CFR 110.7 are reported as expenditures by the committee making them. 11 CFR 104.3(b)(3)(viii). The candidate on whose behalf such expenditures are made, however, does not report these expenditures as contributions. 11 CFR 104.3(a)(3)(iii).

[4] Party political committees are incapable of making independent expenditures. 11 CFR 110.7(a)(5) and (b)(4); Advisory Opinions

national committee of a political party, as defined at 2 U.S.C. § 431(14), may designate the party's congressional campaign committee as its agent for purposes of making these expenditures, if such designation occurs before the designee committee makes the expenditures. See 11 CFR 110.7(a)(4); *FEC v. Democratic Senatorial Campaign Committee* [¶ 9164], 454 U.S. 27, 28-29 (1981); First General Counsel's Report, MUR 1460.[5]

In Advisory Opinion 1984-15, the Commission considered the application of the limitations of 2 U.S.C. § 441a (d) to expenditures for political advertising similar to DCCC's proposed communications. There, the Commission concluded that the limitations of § 441a(d) would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message. See also Advisory Opinion 1978-46 [¶ 5348]. Under the Act and regulations, a candidate is clearly identified if his or her name or likeness appears or if his or her identity is apparent by unambiguous reference. 2 U.S.C. § 431(18); 11 CFR 106.1(d). Electioneering messages include statements "designed to urge the public to elect a certain candidate or party." *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957); see Advisory Opinion 1984-62 [¶ 5813].

Both the "pliers and Toilet Seats" and the "Crumbling Foundation" scripts offer two alternative taglines: one referring to "your Republican Congressman" and one re-

1984-15 and 1980-119 [¶ 5561]; General Counsel's Report, MUR 273.

[5] For purposes of this advisory opinion, the Commission assumes that DCCC is or will be the designated agent of the national committee of the Democratic Party for the purpose of making expenditures pursuant to 2 U.S.C. § 441a(d)(3). This expenditure limitation is in addition to the limitation on contributions by DCCC pursuant to 2 U.S.C. § 441a(a)(2)(A). See 11 CFR 110.7(b)(3); H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976), *reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1976*, 1053 (GPO 1977).

ferring to "the Republicans in Congress." You further state that some scripts will also close with a "Vote Democratic" statement. The Commission concludes that DCCC's expenditures for its proposed radio and television advertisements (with scripts as set forth in this opinion) that use the taglines, "the Republicans in Congress," either with or without the "Vote Democratic" statement (or other electioneering message), will *not* be subject to the Act's limitations. In addition, the Commission concludes that DCCC's expenditures for its proposed advertisements that use the tagline, "your Republican Congressman," *without* the "Vote Democratic" statement, will also *not* be subject to the Act's limitations. Instead DCCC may report these expenditures as operating expenditures. See 11 CFR 104.3(b). These conclusions also apply where the advertisements are directed to only selected congressional districts.

With respect to DCCC expenditures for the proposed radio and television advertisements that use the tagline, "your Republican Congressman," together with the "Vote Democratic" statement, the Commission considered alternative responses but on a tie vote was unable to agree whether such expenditures would or would not be subject to the Act's limitations and attributable pursuant to 11 CFR 106.1. See 11 CFR 112.4(a).

With regard to DCCC's proposed sample mailer, the Commission assumes that its references to "Cong. X" indicate that a specific congressman will be idenified by name. The Commission also assumes that the mailer's dissemination may include part or all of the district represented by the identified congressman. The Commission concludes that DCCC's expenditures for producing and disseminating the mailer either with or without the "Vote Democratic" statement will be subject to the Act's limitations and attributable pursuant to 11 CFR 106.1.

You have indicated that DCCC's proposed program is for the purpose of influencing the 1986 election process

and that these activities will be scheduled for approximately the next month and for September 1985. The Commission emphasizes that this opinion is limited to the timetable you have specified and does not address the implementation of the same or similar program at some later date.

The Commission notes the foregoing discussion responds to the three questions you presented in your letter dated March 18, 1985.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activities set forth in your request. See 2 U.S.C. § 437f.

Dated: May 30, 1985.